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**The Necessary Evil of Preventive Detention:
A Plan for a More Moderate and Sustainable Solution**

by

Stephanie Blum, J.D.

July 2008

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Prepared for: Center for Homeland Defense and Security

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	PROBLEM STATEMENT	2
1.	Status Quo.....	2
2.	Problems with Status Quo.....	5
a.	<i>Legal Concerns</i>	5
b.	<i>Policy Concerns</i>	7
B.	RESEARCH QUESTIONS	8
C.	LITERATURE REVIEW	8
1.	Rationales for Preventive Detention.....	10
2.	Lawfulness of Preventive Detention	15
3.	Israel and Britain’s Approaches to Preventive Detention.....	16
4.	Alternative Approaches to Preventive Detention.....	17
5.	Summary.....	18
D.	METHODOLOGY	18
E.	ORGANIZATION	19
II.	DEFINING THE THREAT	21
A.	INTRODUCTION.....	21
B.	WHAT IS AN ENEMY COMBATANT?	23
C.	WARRIORS OR CRIMINALS?.....	25
D.	UNDERSTANDING THE THREAT LEVEL	39
III.	RATIONALES FOR PREVENTIVE DETENTION IN THE WAR ON TERROR	45
A.	INTERROGATION.....	46
B.	IS INTERROGATION A LEGITIMATE RATIONALE FOR PREVENTIVE DETENTION?	51
C.	INCAPACITATION.....	65
D.	DIFFICULTIES WITH TRYING SUSPECTS IN ARTICLE III COURTS.....	70
IV.	LAWFULNESS OF PREVENTIVE DETENTION	75
A.	CONSTITUTIONAL CONCERNS WITH PREVENTIVE DETENTION.....	76
1.	Fourth and Fifth Amendments to the Constitution	76
2.	War Powers of the President	80
3.	Enemy Combatant Cases: <i>Hamdi</i> , <i>Padilla</i> , and <i>al-Marri</i>	89
a.	<i>Hamdi</i>	89
b.	<i>Padilla</i>	92
c.	<i>Al-Marri</i>	94
B.	STATUTORY CONCERNS WITH PREVENTIVE DETENTION.....	97
C.	CONCLUSION	103

V.	INSIGHT FROM ISRAEL AND BRITAIN'S PREVENTIVE DETENTION REGIMES.....	105
A.	INTRODUCTION.....	105
B.	ISRAEL'S PREVENTIVE DETENTION POLICIES.....	107
1.	Israel Proper.....	108
2.	Palestinian Territories.....	110
3.	Role of Israel's Judiciary.....	113
4.	Israel's 2002 Unlawful Combatants Act	119
5.	Summary of Analysis: Israel versus United States	121
C.	BRITAIN'S PREVENTIVE DETENTION POLICIES.....	123
1.	Britain's Emergency Executive Powers	123
2.	Britain's Emergency Regulations Pre 9/11.....	125
3.	Britain's Regulations Post 9/11.....	127
a.	<i>Foreign Nationals in Britain</i>	128
b.	<i>British Citizens</i>	130
4.	Summary of Analysis: Britain versus United States.....	137
D.	CONCLUSION	139
VI.	METHODOLOGY FOR EVALUATING ALTERNATIVE REGIMES FOR PREVENTIVE DETENTION AS A TOOL IN THE WAR ON TERROR.....	141
A.	LEGALITY	142
B.	SECURITY	143
C.	LIBERTY.....	143
D.	ORGANIZATIONAL FEASIBILITY	146
E.	CONCLUSION	147
VII.	BEYOND THE ENEMY COMBATANT POLICY: ALTERNATIVE APPROACHES FOR PREVENTIVE DETENTION IN THE WAR ON TERROR	149
A.	THE ENEMY COMBATANT APPROACH.....	150
1.	Description.....	150
2.	Analysis	151
a.	<i>Lawfulness</i>	151
b.	<i>Security</i>	152
c.	<i>Liberty</i>	153
d.	<i>Institutional Efficiency</i>	155
e.	<i>Conclusion</i>	155
B.	THE PURIST APPROACH.....	156
1.	Description.....	156
2.	Analysis	158
a.	<i>Lawfulness</i>	158
b.	<i>Security</i>	159
c.	<i>Liberty</i>	163
d.	<i>Institutional Efficiency</i>	163
e.	<i>Conclusion</i>	164
C.	ALTERNATIVE COURT SYSTEM	164
1.	Description.....	164

2.	Analysis	167
a.	Lawfulness.....	167
b.	Security	168
c.	Liberty.....	169
d.	Institutional Efficiency	171
e.	Conclusion.....	172
D.	MODIFYING EXISTING STATUTES/LAW	173
1.	Description.....	173
2.	Analysis	177
a.	Lawfulness.....	177
b.	Security	179
c.	Liberty.....	180
d.	Institutional Efficiency	181
e.	Conclusion.....	181
E.	“EMERGENCY CONSTITUTION”	182
1.	Description.....	182
2.	Analysis	183
a.	Lawfulness.....	183
b.	Security	185
c.	Liberty.....	186
d.	Institutional Efficiency	188
e.	Conclusion.....	188
F.	DETENTION OF ENEMY COMBATANT ACT (DECA)	189
1.	Description.....	189
2.	Analysis	190
a.	Lawfulness.....	190
b.	Security	190
c.	Liberty.....	191
d.	Institutional Efficiency	192
e.	Conclusion.....	193
G.	FOREIGN INTELLIGENCE SURVEILLANCE COURT.....	193
1.	Description.....	193
2.	Analysis	197
a.	Lawfulness.....	197
b.	Security	198
c.	Liberty.....	200
d.	Institutional Efficiency	203
e.	Conclusion.....	203
H.	CONCLUSION	205
VIII.	CONCLUSION: CONGRESS, WHERE ART THOU?	207
	LIST OF REFERENCES	213
	INITIAL DISTRIBUTION LIST	229

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I. INTRODUCTION

We need to debate the long-term sustainable architecture for the process of determining when, why, and for how long someone may be detained as an enemy combatant, and what judicial review should be available.

-Michael Chertoff¹

Mr. Chertoff made this statement in 2003. As of this writing, it is July 2008 and the United States still does not have an architecture in place for “when, why, and for how long” someone, including U.S. citizens, can be detained as enemy combatants. While this war on terror has encompassed many policies such as warrantless surveillance, data-mining, coercive interrogation, and a preemptive war in Iraq – and certainly many articles and books have been and will continue to be written about the aforementioned topics – this paper focuses on one aspect of the war on terror: the labeling of U.S. persons as enemy combatants.

As journalist Benjamin Wittes writes in *Law and the Long War*, “[w]ith the exception of battlefield killing, no action the government takes in this conflict more impinges on human freedom than does long-term incarceration.”² As we approach a new presidential election, it is perhaps time to focus less on “debating” and more on actually enacting a legislative scheme that can finally – after seven years – address preventive detention of terrorist suspects. As such, this paper recommends a concrete solution to the next Administration.

¹ Richard Schmitt, “Patriot Act Author Has Concerns,” *L.A. Times*, November 3, 2003, <http://www.informationclearinghouse.info/article5325.htm> (accessed June 20, 2008). At the time of this comment, Mr. Chertoff was a judge on the United States Court of Appeals for the Third Circuit. He became the Secretary of Homeland Security in February 2005.

² Benjamin Wittes, *Law and the Long War* (New York: The Penguin Press, 2008), 151.

A. PROBLEM STATEMENT

1. Status Quo

One tool in the current war on terror involves the Bush Administration's labeling of alleged terrorists as enemy combatants and detaining them indefinitely, without access to counsel, and without having to file any criminal charges. This enemy combatant policy is really an ad hoc system of preventive detention whereby U.S. citizens or legal residents (hereafter U.S. persons) are detained against their will without the filing of criminal charges for the purposes of incapacitation and interrogation. While the Administration has mostly applied its enemy combatant policy to foreign nationals captured overseas (i.e., aliens detained at Guantanamo Bay) – and this paper addresses those issues – for purposes of scope, this paper primarily focuses on the enemy combatant policy as it applies to U.S. persons who are being detained within the United States.³

Immediately after 9/11, 762 aliens were arrested in connection with the investigation of the September 11 attacks.⁴ Each detainee was held until specifically cleared by the FBI of any connection to terrorist activities. Most of these individuals were ultimately charged with violating immigration law such as remaining in the U.S. after the expiration of their visas or for entering the U.S. illegally. While this “hold until cleared” policy was the Administration's first approach to preventive detention, it only concerned aliens and not U.S. citizens. For citizens, the Administration initially used material witness warrants under 18 U.S.C. § 3144.

³ While there are a handful of U.S. citizens being detained in Iraq and Afghanistan, they are not addressed in this thesis because they are being detained by multinational forces or have been convicted in foreign criminal proceedings, hence raising a host of other issues not directly pertinent to preventive detention of U.S. persons in the United States. In June 2008, the Supreme Court held unanimously in *Munaf v. Secretary of the Army* (06-1666) and *Secretary of the Army v. Omar* (07-394) that, while U.S. citizens detained overseas by American forces have the right to habeas corpus, the U.S. government nonetheless has the authority to transfer them to foreign custody.

⁴ Paul Rosenzweig and Jay Carafano, “Preventive Detention and Actionable Intelligence,” *Legal Memorandum Published by the Heritage Foundation*, no. 13, (September 2004), 5 www.heritage.org/Research/HomelandSecurity/upload/68849_1.pdf (accessed September 7, 2007).

Material witness warrants are traditionally used to arrest and detain material witnesses to criminal activity when it is believed that the witnesses will leave the jurisdiction to avoid having to testify. The threshold for detention as a material witness is that the person has testimony “material” to a criminal proceeding and that securing the testimony through a subpoena is “impracticable.”⁵ After 9/11, the Attorney General announced a policy of “aggressive detention” of material witnesses, and at least 70 people (including Jose Padilla and Ali Saleh al-Marri, discussed below) were detained under the rationale that they were “material witnesses” without any criminal charges filed.⁶ Under the statute, however, “[n]o material witness may be detained . . . if the testimony of such a witness can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice.”⁷ As Law Professor Stephen Schulhofer aptly points out, unless this exception is expanded to swallow the rule, the material witness statute is a poor choice to detain terrorist suspects pending further investigation and trial.⁸ Furthermore, as Paul Rosenzweig and James Carafano from The Heritage Foundation have noted: “[T]he approval of material witness warrants as a legal tool cannot obscure the practical reality that they were being used for a purpose different from that which Congress initially intended – the detention of witnesses despite the lack of any real need for their testimony.”⁹

The Bush Administration recognized the inherent limitations of creating a preventive detention regime using the material witness statute and transferred Padilla and al-Marri to military custody as enemy combatants in 2002 and 2003, respectively. President Bush justified his unilateral decisions to label individuals as enemy combatants on the exercise of his war power as Commander in Chief under Article II of the

⁵ *Release or Detention of a Material Witness*, U.S. Code 18 (1986), § 3144.

⁶ Serrin Turner and Stephen Schulhofer, *The Secrecy Problems in Terrorism Trials*, Liberty and National Security Project (New York: Brennan Center for Justice at NYU School of Law, 2005), 38, www.brennancenter.org/secrecyproblem.pdf (accessed September 7, 2007).

⁷ U.S. Code 18 (1986), § 3144.

⁸ Schulhofer and Turner, *The Secrecy Problems in Terrorism Trials*, 38.

⁹ Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 5.

Constitution and the Joint Resolution passed by Congress after 9/11 to use all “necessary and appropriate force” against those who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.”¹⁰

Significantly, after 9/11, the Administration determined that the Geneva Conventions did not apply to the conflict with the Taliban and al Qaeda.¹¹ Hence, all Taliban and al Qaeda operatives were *automatically unlawful* “prisoners of war” and could be subjected to interrogation.¹² In August 2002, Jay Bybee, Assistant Attorney General in the Office of Legal Counsel, sent President Bush a memorandum stating: “As commander-in-chief, the President has constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.”¹³ As Law Professor Howard Ball observes, “[t]he Administration has offered one fundamental rationale for such treatment [designations of enemy combatants]: the acquisition of actionable intelligence.”¹⁴

In addition to the need for information, the Administration argues that its enemy combatant policy is necessary to incapacitate terrorists so they do not return to the battlefield. Yet, if the battlefield includes the United States and the war is indefinite, the implication of incapacitation as a rationale for prevention detention is staggering. Essentially, under the enemy combatant policy, the executive branch can unilaterally designate any U.S. person in the United States as an enemy combatant and hold that individual incommunicado, indefinitely, and with no criminal charges for the purposes of

¹⁰ *Authorization to Use Military Force (AUMF)*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 224.

¹¹ On February 7, 2002, President Bush issued an executive order determining that members of al Qaeda and the Taliban are unlawful enemy combatants who are not entitled to the protections of the Third Geneva Convention. The full text of the executive order can be seen at: http://lawofwar.org/Bush_torture_memo.htm (accessed July 8, 2008).

¹² Under the Third Geneva Convention of 1949, prisoners of war cannot be interrogated. Rather, they are required to provide only “surname, first names and rank, date of birth, and army, regimental, personal or serial number.” In fact, “[n]o physical or mental torture, *nor any other form of coercion*, may be inflicted on prisoners of war to *secure from them information of any kind whatsoever*.” *Geneva Convention*, Part III.A.17. (Emphasis added.)

¹³ Howard Ball, *Bush, the Detainees and the Constitution* (Kansas: University Press of Kansas, 2007), 47.

¹⁴ *Ibid.*, 54.

coercive interrogation and incapacitation. Furthermore, as will be explained in Chapter II, the chance of detaining an innocent person seems high if terrorists purposely try to blend into the population. As journalists Ben Wittes and Mark Gitenstein observe: “The paradox is that, precisely because terrorists flout the rules of warfare and make themselves harder to distinguish from civilians when captured, they necessitate a level of due process that conventional forces, which make no secret of their status as belligerents, do not require.”¹⁵

Jose Padilla (U.S. citizen arrested in Chicago), Yaser Hamdi (U.S. citizen arrested in Afghanistan), and Ali Saleh al-Marri (legal resident arrested in Peoria, Illinois) have all been designated at one point as enemy combatants and subjected to this Administration’s preventive detention regime. While it appears there have only been three U.S. persons subjected to such treatment, the government threatened to designate others such as John Walker Lindh (American Taliban), Iyman Faris (who was planning to destroy the Brooklyn Bridge) and the Lackawanna Six (Buffalo terrorist cell) as enemy combatants if they did not plead guilty to a variety of criminal charges and cooperate with authorities.¹⁶ Not surprisingly, they all pled guilty.

2. Problems with Status Quo

Designating U.S. persons as enemy combatants and holding them incommunicado and indefinitely for a war on terror that may never end raises serious legal and policy concerns.

a. Legal Concerns

As will be addressed in depth in Chapter IV, it is presently unclear whether President Bush’s broad application of his enemy combatant policy as applied to U.S. persons captured in peaceful civilian areas will prove to be lawful. A plurality of

¹⁵ Benjamin Wittes and Mark Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” *Brookings, Opportunity* 08 (2008), http://www.brookings.edu/papers/2007/1115_terrorism_wittes_opp08.aspx (accessed June 26, 2008).

¹⁶ Jesselyn Radack, “The Government’s Opportunistic Use of the ‘Enemy Combatant’ Label: How This Category Is Being Used as a Prosecution Tactic,” *Findlaw*, October 11, 2004, http://writ.news.findlaw.com/commentary/20041011_radack.html (accessed June 24, 2008).

the Supreme Court held in *Hamdi v. Rumsfeld* that the President can designate citizens caught in an active zone of combat as enemy combatants for the duration of the particular hostilities as long as the individual can challenge that designation in a neutral forum.¹⁷ After the decision, the Administration released Hamdi to Saudi Arabia without any kind of adversarial hearing. Significantly, the Supreme Court has not squarely addressed whether a U.S. citizen, such as Padilla, or legal resident, such as al-Marri, can be arrested in the United States (as opposed to a battlefield), labeled an enemy combatant, and held indefinitely without charges. As will be detailed in Chapter III, the Administration transferred Padilla to the criminal justice system in 2005 presumably to avoid a show-down at the Supreme Court over the enemy combatant policy.¹⁸ Padilla was subsequently convicted of terrorism-related charges and sentenced to seventeen years in prison in 2007.

As of this writing, it appears that Ali al-Marri is the only U.S. person currently being detained as an enemy combatant. On July 15, 2008, the full Fourth Circuit ruled in a split decision 5-4 that the Administration does have the authority to designate U.S. persons captured in peaceful civilian areas as enemy combatants but that the government needs to submit more than a declaration based on hearsay to support such a designation, or explain why a declaration is the “most reliable available evidence” to support indefinite detention of al-Marri as an enemy combatant.¹⁹ Consequently, the Fourth Circuit remanded the case for further evidentiary proceedings to allow al-Marri to better challenge the underlying evidence. It is presently unclear whether the Bush Administration or al-Marri will ask for an interlocutory appeal to the Supreme Court; whether the Supreme Court would grant certiorari; or whether the Bush Administration will submit additional evidence on remand to support its designation of al-Marri as an enemy combatant. In sum, as of July 2008, the Supreme Court has not ruled on the

¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality). All subsequent cites to *Hamdi* will be to the plurality opinion unless otherwise noted.

¹⁸ “Court Overrules Bush’s ‘Enemy Combatant’ Policy,” *MSNBC*, June 11, 2007, <http://www.msnbc.msn.com/id/19172214/> (accessed September 28, 2007).

¹⁹ *al-Marri v. Pucciarelli*, No. 06-7427, __ F.3d __, 2008 WL 2736787, * 45 (4th Cir. July 15, 2008) (en banc).

pivotal constitutional question of whether U.S. citizens, such as Padilla, or legal residents, such as al-Marri, can be detained indefinitely as an enemy combatant with no criminal charges.

b. Policy Concerns

Independent of whether the enemy combatant policy as applied to U.S. persons is ultimately found to be lawful, there is the significant question of whether it is an effective policy. Because there has not been another terrorist attack in the United States since 9/11, and because, as will be addressed in Chapter III, information from captured enemy combatants has resulted in the thwarting of specific terrorists plots and the capture of more al Qaeda operatives, it can be argued that the enemy combatant policy has made the nation considerably safer.

Nonetheless, designating U.S. persons as enemy combatants and holding them incommunicado and indefinitely for a war on terror that may never end may ultimately undermine the United States' objectives. Assuming there is genuine need for preventive detention as a tool in the war on terror, and assuming a regime can be created that is lawful, there remains the underlying question of sound policy: to what extent can the United States create a system of preventive detention that is perceived as fair, applied consistently, and narrowly-tailored to meet its objectives. A significant negative repercussion to the enemy combatant policy is that other democratic countries may be hesitant to cooperate with the United States in pursuing terrorist suspects due to displeasure at the United States' preventive detention policies. Not surprisingly, the enemy combatant policy has sparked criticism from individuals across the political spectrum.

While it appears the Bush Administration has only employed its enemy combatant policy sparingly to three U.S. persons (although it has threatened to use it numerous more times), its implications are far-reaching, especially if another terrorist attack occurs rivaling 9/11. As Yale Law Professor Bruce Ackerman notes, "[t]hese cases [Padilla and Hamdi] present a unique threat to the survival of the republic. If the president can throw citizens into solitary confinement for years on end, our democracy is

in very deep trouble.”²⁰ Despite the implications of the enemy combatant policy – or perhaps because of them – the Administration has not repudiated its policy. Given that the war on terror is unlikely to end soon, it would be imprudent to wait for the Supreme Court to rule before creating a more sustainable, thought-out approach to preventive detention that is consistent with America’s principles of due process. Furthermore, given the inevitable change in Administration that will occur in 2008, it is an opportune time to think through the complex legal issues now and be ready to propose a better solution to the new Administration.

B. RESEARCH QUESTIONS

Based on the above discussion outlining the problems with the status quo approach to detaining U.S. persons as enemy combatants, this paper will address the following questions:

- To what extent, if any, does the United States need a system of preventive detention where suspected terrorists are detained against their will without the filing of criminal charges as a tool in the war on terror?
- How can the United States create a system of preventive detention that is lawful and good policy without undermining its credibility, reputation, and democratic principles?
- Are interrogation and incapacitation of terrorist suspects legitimate and justifiable rationales for creating a system of preventive detention?
- How do Israel and Britain, which have dealt with terrorist threats for decades, handle preventive detention and can their approaches provide useful insight to the United States in the war on terror?
- What are the other ideas that policy-makers, lawyers, and academics have proposed for creating systems of preventive detention as a tool in the war on terror and how do these approaches compare to one another and the status quo?

C. LITERATURE REVIEW

To answer the aforementioned questions, it is necessary to look at the existing literature addressing these issues. While a plethora of literature exists criticizing the

²⁰ Bruce Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism* (New Haven and London: Yale University Press, 2006), 35.

Administration's enemy combatant policy as unlawful and/or unsound policy, and many professors and policy-makers have proposed alternative approaches to preventive detention, there is a dearth of literature that thoroughly analyzes and addresses more fundamental questions such as whether the United States needs a system of preventive detention as a tool in the war on terror; whether the rationales for preventive detention are justifiable; whether Israel and Britain's respective approaches to preventive detention to deal with terrorism provide useful insights for the United States; whether a system of preventive detention can be lawful; and whether it is worth the consequent deleterious effects to America's reputation. While articles, legal decisions, and books have addressed *aspects* of these questions (especially questions relating to the legality and policy implications of preventive detention), there does not appear to be a body of literature that examines all these questions while also comparing and contrasting the alternative approaches advocated for preventive detention under a methodology that includes fundamental democratic principles.

Before analyzing the substance of the literature, it is necessary to briefly describe the authors and kinds of literature that exist to answer these questions. Except for the myriad of newspaper editorials lambasting the enemy combatant policy, most of the scholarly literature addressing preventive detention as a tool in the war on terror is written by lawyers who are law professors, judges, or policy-makers. This fact should come as little surprise because preventive detention is fundamentally a legal question implicating the Fourth, Fifth and Sixth Amendments of the Constitution, Articles I and II of the Constitution, the writ of habeas corpus, and the Non-Detention Act of 1971, which provides that: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."²¹ Therefore, most of the literature relevant to preventive detention as a tool in the war on terror consists of law review articles, legal decisions, books addressing civil liberties, and reports compiled by think tanks or policy organizations.

²¹ *Non-Detention Act of 1971*, U.S. Code 18, § 4001(a).

Because no body of literature addresses all aspects of the questions identified above concerning preventive detention, this review divides the literature into sub-literature focusing on: (1) the rationales for preventive detention; (2) the lawfulness of preventive detention; (3) other countries' approaches to preventive detention; and (4) alternative ideas to the current enemy combatant policy.

1. Rationales for Preventive Detention

As will be explained in detail in Chapter III, the Administration's main rationale behind preventive detention is to facilitate interrogation of suspected members of al Qaeda or the Taliban. While many legal scholars have argued for alternative approaches to preventive detention that would allegedly provide more due process rights to detainees, there does not appear to be much scrutiny of the Administration's underlying reason for preventive detention: interrogation. In other words, it appears that commentators have accepted as given that interrogation produces actionable intelligence and focused the inquiry on the legality and policy ramifications of Bush's enemy combatant policy.

As the concept of preventive detention as a tool in the war on terror is based on the underlying rationales for preventive detention, foremost interrogation, it is necessary to look to a body of literature that addresses whether, and under what circumstances, interrogation of suspected terrorists actually produces actionable intelligence. If we accept the Administration's assertions as true, there is certainly evidence that interrogation of high value al Qaeda operatives has produced useful intelligence. John Yoo, former Deputy Assistant Attorney General under the Bush Administration, states that "intelligence gathered from captured al Qaeda and Taliban fighters allowed our intelligence, military, and law enforcement to frustrate plots that could have killed thousands of Americans."²² He explains in his book *War by Other Means: An Insider's Account of the War on Terror* how the captures and subsequent interrogations of Abu Zubaydah (al Qaeda's chief military planner) and Ramzi bin al Shibh lead to the capture of Khalid Sheikh Mohammed (KSM), who has been described as the "principal architect"

²² John Yoo, *War by Other Means, An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), 45. Mr. Yoo is currently a law professor at University of California at Berkeley's Boalt Hall law school.

of the 9/11 attacks.²³ Furthermore, in a June 2004 press release by former Deputy Attorney General James Comey, Comey describes how all three of these men played an instrumental role in training and preparing Jose Padilla for his mission to detonate a radioactive bomb in America.²⁴ Conversely, Pulitzer Prize winning journalist, Ron Suskind, notes in his book *The One Percent Doctrine*, that al Qaeda operative Abu Zubaydah may have been a mentally ill low-level logistics person who did provide useful information to the Administration.²⁵

An obvious piece of literature assessing the validity of the Administration's assertions that captured al Qaeda operatives have produced useful intelligence would be the *Detainee Interrogation Reports*, mentioned and relied on by the authors of the bipartisan *9/11 Commission Report*. While the commissioners note that they used corroborating evidence as much as they could to assess the accuracy of the information, they state "[a]ssessing the truth of statements by these witnesses – sworn enemies of the United States – is challenging."²⁶ Because the *Detainee Interrogation Reports* are understandably classified, there is an inherent gap in the literature needed to evaluate whether interrogation of detainees produces actionable intelligence.

This gap is partially mitigated by the December 2006 Intelligence Science Board (ISB)²⁷ 374-page report examining several aspects of interrogation methods. The ISB notes that no significant scientific research has been conducted in more than four decades about the effectiveness of many interrogation techniques that are regularly used by the

²³ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 167.

²⁴ Deputy Attorney General James Comey, remarks concerning Jose Padilla, June 1, 2004, <http://www.usdoj.gov/archive/dag/speeches/2004/dag6104.htm> (accessed November 10, 2007).

²⁵ Ron Suskind, *The One Percent Doctrine* (New York: Simon and Schuster, 2006), 95-100.

²⁶ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: W.W. Norton and Co, n.d.), 146.

²⁷ The Intelligence Science Board was chartered in August 2002 and advises the Office of the Director of National Intelligence and senior intelligence community leaders on emerging scientific and technical issues of special importance to the intelligence community. This study was sponsored by the Defense Intelligence Agency, the Intelligence Technology Innovation Center, and the Defense Department's Counterintelligence Field Activity.

military and intelligence groups.²⁸ The ISB recommends additional scientific research of interrogation methods (both retrospective analyses of data about past interrogations and new studies that relate different practices to the value of the information obtained) to determine what is effective.²⁹ While the ISB does not focus on preventive detention but rather the effectiveness of interrogation, given that interrogation is the main rationale for preventive detention, the ISB report is a significant piece of the sub-literature for a paper on preventive detention.

Another rationale argued by the Bush Administration for its enemy combatant policy is incapacitation, i.e., the prevention of terrorist suspects from returning to the battlefield. This was one of the main justifications articulated by the Bush Administration for detaining Hamdi. According to the facts presented in an affidavit from a Defense Department official (Mobbs declaration), Hamdi surrendered to the Northern Alliance who turned him over to U.S. authorities.³⁰ Justice O'Connor, in her plurality opinion in *Hamdi*, explicitly upheld incapacitation as a justification for preventive detention as long as the individual was held only for the duration of hostilities and allowed an opportunity to challenge the designation as an enemy combatant.³¹

Yet, significantly, after this ruling, the Administration did not provide Hamdi a meaningful opportunity to challenge his designation as an enemy combatant. Rather, in October 2004, the government released Hamdi to Saudi Arabia after it determined that he no longer posed a threat to the United States, thereby undermining – to some extent – the Administration's rationale of needing to detain this dangerous individual so he does not return to the battlefield.³² Nonetheless, there is evidence to suggest that al Qaeda

²⁸ Robert Fein, "Introduction, Intelligence Science Board Study on Educating Information," in *Educating Information Interrogation: Science and Art* (Washington, DC: Center for Strategic Intelligence Research, June 2006), 6, www.fas.org/irp/dni/educing.pdf, (accessed October 11, 2007).

²⁹ Fein, "Introduction, Intelligence Science Board Study on Educating Information."

³⁰ *Hamdi*, 542 U.S. at 507.

³¹ *Ibid.*, 519.

³² Michael Isikoff and Mark Hosenball, "Out of the Brig: 'Enemy Combatant' Yaser Hamdi Will Soon be Released from a Military Prison without Facing Any Charges," *Newsweek*, September 15, 2004, <http://www.msnbc.msn.com/id/6012286/site/newsweek/> (accessed September 4, 2007).

detainees who have been released have returned to the battlefield.³³ However, again, as with the literature on interrogation, it is hard to assess the accuracy of incapacitation as a rationale for preventive detention when the executive contains the information, which is largely classified or not able to be challenged in a court of law, such as the Mobbs declaration, which is based on hearsay from Northern Alliance members.

A third plausible justification for preventive detention could be difficulties with trying terrorist suspects in Article III courts, although as will be explained in Chapter III, this rationale is more concerned with *where* terrorist suspects are to be tried as opposed to whether they need to be preventively detained. This is the weakest of plausible reasons for preventive detention, yet it has spawned the most amount of literature. Evidence establishing individuals as terrorists may not be able to be produced in a federal court without disclosing clandestine intelligence assets and/or there may not be enough evidence to obtain a conviction beyond a reasonable doubt. Serrin Turner, Associate Counsel for the Liberty & National Security Project at the Brennan Center for Justice at NYU School of Law, and Stephen Schulhofer, law professor at NYU, have addressed these questions in an article entitled *The Secrecy Problems in Terrorism Trials*.³⁴ While their focus is not on creating a preventive detention regime per se but rather on trying terrorism suspects in federal courts as opposed to military tribunals, their article sheds important light on the challenges and complications with using current statutes and federal court to handle terrorism suspects.

Similarly, human rights lawyers Richard Zabel and James Benjamin, Jr., argue in their exhaustive white paper *In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts* that the criminal justice system is capable of detaining and trying

³³ Ruth Wedgewood, "The Supreme Court and The Guantanamo Controversy," in *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz (Stanford, CA: Hoover Institution Press Publication, 2005), 176.

³⁴ Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*, 3-4.

terrorists and that there is no need to create a regime of preventive detention.³⁵ Former federal prosecutors Kenneth Roth and Kelly Anne Moore make the same argument.³⁶

Conversely, Yoo devotes an entire chapter in *War by Other Means* to discussing the difficulties with protecting the nation's military and intelligence secrets with the goal of providing a fair trial for terrorists.³⁷ Unlike Schulhofer, Serrin, Zabel, Benjamin, Roth and Moore who conclude that most, if not all, terrorism prosecutions should occur in federal court, perhaps, with modifications to existing statutes, Yoo maintains that separate military commissions are essential. As will be explained in Chapter VII, several prominent individuals agree with Yoo and argue that the criminal justice system is inadequate to try and detain terrorists. Whatever the ultimate conclusions about *where* terrorism suspects should be tried, there is abundant literature discussing the difficulties with trying terrorism suspects in federal court.³⁸ This stands in stark contrast to the classified nature of much of the literature dealing with the effectiveness of interrogation and incapacitation.

In sum, the sub-literature discussing the rationales for preventive detention is varied depending on which rationale is being analyzed. While there is more literature discussing the inherent difficulties in trying terrorism suspects in federal court, there is comparatively less literature discussing interrogation of intelligence assets and general incapacitation, which are the primary justifications for the Bush Administration's enemy combatant policy. A challenge with the existing literature is the inability to thoroughly assess the validity of these assertions. Nonetheless, this challenge can be somewhat

³⁵ Richard B. Zabel and James J. Benjamin, Jr., "In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts," *Human Rights First* (May 2008).

³⁶ Kenneth Roth, "After Guantanamo, The Case Against Preventive Detention," *Foreign Affairs*, (May/June 2008), <http://www.foreignaffairs.org/20080501facomment87302/kenneth-roth/after-guantanamo.html> (accessed June 13, 2008); Kelly Anne Moore, "Take Al Qaeda to Court," *New York Times*, August 21, 2007, <http://www.nytimes.com/2007/08/21/opinion/21moore.html> (accessed June 15, 2008).

³⁷ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 204-230.

³⁸ See, e.g., Amnesty International, *USA: Justice Delayed and justice Denied? Trials under the Military Commissions Act* (London: International Secretariat, 2007); James Renwick and Gregory Treverton, "The Challenges of Trying Terrorists as Criminals," *RAND Center for Global Risk and Security* (2008); Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*; Zabel and Benjamin, "In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts."

mitigated by relying on bipartisan government reports, such as the *9/11 Commission Report*, which discuss the results of interrogation and on the ISB report which discusses the challenges of interrogation.

2. Lawfulness of Preventive Detention

Assuming the rationales for creating a preventive detention regime in this war on terror are legitimate, the next question is whether a system of preventive detention can be created that is lawful. The lawfulness of preventive detention is thoroughly discussed in Chapter IV. To date, it appears that President Bush has applied his enemy combatant policy to three U.S. persons, Yasir Hamdi, Jose Padilla, and Ali al-Marri, who have all challenged their respective designations in federal courts.³⁹ Hence, the legal decisions written in these cases by federal judges, including Supreme Court Justices, and the legal briefs submitted by the respective parties in these cases is a critical part of the literature review. While as explained above the cases involving Hamdi and Padilla are resolved, as of this writing, the fate of al-Marri is still pending as the Fourth Circuit remanded his case for an evidentiary hearing. Therefore, the legal decisions affecting the enemy combatant policy are still being debated and will be an ongoing part of the literature review.

Other relevant legal decisions discuss the contours of preventive detention in other contexts such as pretrial detention,⁴⁰ mental health confinement or quarantines,⁴¹ and the war powers of the President.⁴² To this end, the City of New York Bar

³⁹ See, e.g., *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp.2d 42, 49 (S.D.N.Y. 2003); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Padilla*, 423 F.3d 386 (4th Cir. 2005); *Padilla v. Hanft*, 547 U.S. 1062 (2006); *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006); *al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), rehearing en banc granted (August 22, 2007); *al-Marri v. Pucciarelli*, No. 06-7427, ___ F.3d ___, 2008 WL 2736787 (4th Cir. July 15, 2008) (en banc).

⁴⁰ *United States v. Salerno*, 481 U.S. 739 (1987).

⁴¹ *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

⁴² *Zadvydas v. Davis*, 533 U.S. 678 (2001) *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 1 (1942) *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Milligan*, 71 U.S. 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

Association wrote a 153-page report discussing the due process concerns of the indefinite detention of enemy combatants.⁴³ While the report does not compare and analyze alternative approaches to preventive detention, its exhaustive description of the legal landscape provides a solid foundation for any paper on preventive detention.

As discussed above, a significant book discussing the Administration's enemy combatant policy is *War by Other Means*, written by Yoo, the former Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice who played an instrumental role in creating and shaping the enemy combatant policy.⁴⁴ In this book, Yoo explains the legal justifications that are behind the enemy combatant designations. Given Yoo's role in creating this preventive detention regime, his book serves an important part of the background for any discussion of preventive detention as a tool in the war on terror.

In sum, there is an abundant amount of literature – whether legal decisions, law review articles, or books – that comprehensively addresses the legality of preventive detention. While some authors believe that the enemy combatant policy is legal, others do not. At first blush, there do not appear to be any inherent weaknesses with this body of literature addressing the legality of preventive detention. Yet, upon scrutiny, most of the literature addressing the legality of preventive detention serves to either criticize the current enemy combatant policy or justify it without creatively looking at how the law can be fashioned to create alternative preventive detention regimes consistent with due process standards.

3. Israel and Britain's Approaches to Preventive Detention

As will be discussed in Chapter V, Israel and Britain have been combating terrorism for decades, and each country has created administrative or preventive detention regimes to deal with incapacitation and interrogation of terrorist suspects.

⁴³ Association of the Bar of the City of New York, Committee on Federal Courts, "The Indefinite Detention of 'Enemy Combatants': Balancing Due Process and National Security in the Context of the War on Terror," (New York: Association of the Bar of the City of New York, 2004), 111, www.abcnyc.org/pdf/1C_WL06!.pdf (accessed September 7, 2007).

⁴⁴ Yoo, *War by Other Means, An Insider's Account of the War on Terror*.

Hence, the literature discussing how these countries deal with preventive detention provides a useful perspective to compare to the current enemy combatant approach. In 2004, Professor Schulhofer wrote a law review article entitled *Checks and Balances in Wartime: American, British and Israeli Experiences* where he compares the preventive detention regimes of these three countries.⁴⁵ While his article provides an abundant amount of detail on the British and Israeli preventive detention regimes, his ultimate conclusion is that America's current enemy combatant policy bypasses judicial review and checks and balances that have played a role in Britain and Israel's regimes. Despite this article doing a formidable job of what it attests to do (compare the three countries' approaches to preventive detention), it does not provide an alternative approach to the enemy combatant policy except for generally criticizing the current approach.

4. Alternative Approaches to Preventive Detention

Many individuals from across the political spectrum have criticized the Administration's enemy combatant policy and suggested alternative ways to create preventive detention regimes during this war on terror.⁴⁶ While the details of these various proposals will be discussed and categorized in Chapter VII, as a whole, they

⁴⁵ Stephen Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," *Michigan Law Review*, 102 (August 2004): 1906-1958.

⁴⁶ See e.g., Thomas Powers, "WHEN TO HOLD 'EM, The U.S. Should Detain Suspected Terrorists—Even if it Can't Make a Case Against Them in Court," *Legal Affairs* (September/October 2004), http://www.legalaffairs.org/issues/September-October-2004/argument_powers_sep0ct04.msp (accessed September 4, 2007); Andrew McCarthy, "Abu Ghraib and Enemy Combatants: An Opportunity to Draw Good Out of Evil," *National Review*, May 11, 2004; <http://www.nationalreview.com/mccarthy/mccarthy200405110832.asp> (accessed September 4, 2007); Jack Goldsmith and Neal Katyal, "The Terrorists' Court," *New York Times*, July 11, 2007, Opinion section, <http://www.nytimes.com/2007/07/11/opinion/11katyal.html> (accessed June 15, 2008); Harvey Rishikof, "A Federal Terrorism Court," *Progressive Policy Institute*, (November 2007), http://www.ppionline.org/ppi_ci.cfm?knlAreaID=124&subsecID=307&contentID=254507 (accessed June 26, 2008); Bruce Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*; Philip B. Heymann and Juliette N. Kayyem, "Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism," *National Memorial Institute for the Prevention of Terrorism* (MIPT) (April 2003 – November 2004), 33-50, <http://www.ksg.harvard.edu/bcsia/longtermlegalstrategy> (accessed August 15, 2007); Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*; Rosenzweig and Carafano, "Preventive Detention and Actionable Intelligence"; Tung Yin, "Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees," *Harvard Journal of Law and Public Policy*, 29, no. 1 (September 2005): 150-212; George Terwilliger, III, "'Domestic Unlawful Combatants': A Proposal to Adjudicate Constitutional Detentions," *Engage*, 7, no. 2 (October 2006): 55-63.

largely fail to thoroughly address whether the Administration's underlying rationales for preventive detention – interrogation, incapacitation and to a lesser extent difficulties with trying terrorism suspects in federal court – are legitimate and justifiable. Furthermore, while all these approaches to preventive detention have strengths and weaknesses, a weakness of the literature as a whole is that there is minimal comparative analysis among the various approaches. None of the literature contains a methodology for evaluating its approach versus the other alternative approaches and few contain an in-depth analysis of whether a system of preventive detention is needed as a tool in the war on terror.

5. Summary

There is abundant literature written by lawyers and policy-makers that addresses the lawfulness of preventive detention, other countries' approaches to preventive detention, and alternative preventive detention regimes to the enemy combatant policy. There is minimal literature that analyzes the underlying rationales for preventive detention, namely interrogation and incapacitation, due to the classified nature of the inquiry. Nonetheless, by using bipartisan government reports, one can begin to evaluate whether interrogation produces actionable intelligence to justify a system of preventive detention. While preventive detention has significant consequences for any democracy, what is lacking in the literature is a comprehensive analysis of all the different components of preventive detention that compares and contrasts alternative approaches to preventive detention under a methodology upholding democratic principles.

D. METHODOLOGY

Many lawyers, professors, and policy-makers have advocated alternative regimes to the Bush Administration's enemy combatant policy for detaining suspected terrorists. As will be explained in Chapter VII, the ideas proposed range from the "purist" approach, which essentially means no system of preventive detention, to creating entirely new court systems to deal not only with detaining suspected terrorists for purposes of interrogation and/or incapacitation but also for ultimately trying them for various war crimes or violations of criminal statutes. Other ideas advocated for preventive detention include

making modifications to the current criminal justice system, creating an “emergency constitution” with provisions for preventive detention after another terrorist attack, or – as proposed by this author – having the Foreign Intelligence Surveillance Court (FISC) monitor a regime of preventive detention regime.

In order to evaluate these alternative approaches against each other as well as against the status quo enemy combatant policy, it is helpful to identify a framework for assessing criteria that are important underpinnings of a democratic society. For purposes of this paper, each approach to preventive detention will be analyzed using four parameters, namely whether and to what extent the approach is likely to (1) be legal; (2) protect security; (3) enhance liberty; and (4) be efficient from an organizational/institutional standpoint. The details of this methodology will be explained in Chapter VI.

E. ORGANIZATION

The crux of this paper compares alternative approaches to preventive detention and recommends the FISC approach. This analysis will be discussed in Chapter VII. For a policy-maker looking to understand the current proposed options for preventive detention, this chapter may be enough. Yet, the bulk of this paper is background information that is essential to fully understanding and appreciating preventive detention as a tool in the war on terror. In other words, the policy options in Chapter VII will be placed in a better context if the chapters are read in order.

In Chapter II, the nature of terrorism is explored to better understand the threat level and how it compares to previous conflicts the United States has faced. It also addresses to what extent, if any, this conflict should be thought of as a “war” as opposed to “crime.” This chapter serves to better define the problems with the enemy combatant policy and its implications for creating a system of preventive detention as a tool in this war on terror.

Chapter III looks at the underlying rationales for preventive detention as a tool in the war on terror. Without a thorough understanding of the reasons needed for preventive

detention, one cannot begin to evaluate alternatives to the enemy combatant policy or – more fundamentally – whether a system of preventive detention is even needed as a tool in this war on terror.

Chapter IV looks at the question of lawfulness from a constitutional and statutory perspective. If preventive detention is needed as a tool in the war on terror, this chapter explores how a regime of preventive detention could be created that complies with the Constitution and Non-Detention Act of 1971.

Chapter V discusses how two other Western democracies, namely Israel and Britain, have dealt with incapacitation and interrogation of terrorist suspects throughout decades of dealing with terrorism to see if any insights could be beneficial to the United States.

Chapter VI discusses a methodology to evaluate alternatives to the enemy combatant policy that are explored in Chapter VII. The methodology generally looks at questions of lawfulness, the balance between liberty and security, and institutional efficiency. While the methodology is not scientific, it does emphasize some important concepts that can be used to make a meaningful comparative analysis.

Chapter VII – the crux of the paper – describes and analyzes all the alternatives to the enemy combatant policy under the methodology described in Chapter VI. While it proposes a range of solutions depending on the threat level and priorities of the American public, it argues that a preventive detention regime run by the FISC is the optimal choice for the United States.

Chapter VIII, the conclusion, requests Congress to enact a comprehensive preventive detention regime for U.S. persons. Congress has been remarkably silent for the last seven years and it is time for a new solution. While this author believes the FISC approach is superior to the other alternatives proposed, the overriding recommendation is that Congress create a more moderate solution that is lawful, efficient, and better balances liberty with security.

II. DEFINING THE THREAT

We need a climate more sensitive to the awesome task at hand: designing a law for a long war, a war that isn't quite a war, but isn't quite anything else either, a war that we still have not compelling defined and may never fully define and yet will need to regulate and prosecute anyway.

-Benjamin Wittes⁴⁷

A. INTRODUCTION

On September 20, 2001, in a joint session to Congress, President Bush declared: “Our *war on terror* begins with al Qaeda, but it does not end there. It will not end until *every* terrorist group of global reach has been found, stopped and defeated.”⁴⁸ In March 2006 – almost five years after 9/11 – President Bush began *The National Security Strategy* by stating that “America is at war.”⁴⁹ By defining 9/11 as an act of war – and not merely mass murder – President Bush made a strategic choice to shape America’s response to al Qaeda (or any terrorist group that attacks America) as war as opposed to criminal investigation and trial, which had characterized America’s response to terrorism before 9/11. From a public perception standpoint, it is easier to justify a substantial amount of resources to win a war than fight crime. Political scientist William Rosenau observes that calling the conflict a “war” is “inspirational” as it “is meant to arouse the U.S. public and signal the U.S. government’s commitment to defeating a formidable and cruel foe.”⁵⁰ Furthermore, by using the term “war,” President Bush pre-determined that the military would need to remain engaged in the conflict.

⁴⁷ Wittes, *Law and the Long War*, 260.

⁴⁸ George W. Bush, President of the U.S., *Address to a Joint Session of Congress and the American People* (Washington, DC: White House, September 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (accessed March 20, 2008) (Emphasis added).

⁴⁹ White House, *National Security Strategy of the United States of America* (Washington, DC: White House, March 2006).

⁵⁰ William Rosenau, “US Counterterrorism Policy,” in *How States Fight Terrorism*, eds. Doron Zimmermann and Andreas Wenger (London: Lynne Rienner Publications, 2007), 133.

In fighting this war on terror, the Bush Administration implemented its enemy combatant policy – an unprecedented form of preventive detention whereby the executive branch unilaterally decides whether to detain a terrorist suspect incommunicado without criminal charges for the duration of the war on terror for the purposes of incapacitation and interrogation. (These purposes will be explored in-depth in Chapter III.) As law professors Samuel Issacharoff and Richard Pildes describe: “The most controversial legal power that the U.S. government has not just asserted but actually deployed at this point in the war on terrorism is probably the power to detain preventatively both citizens and noncitizens who the executive considers are ‘enemy combatants.’”⁵¹

Significantly, the Bush Administration’s justification for its enemy combatant policy is couched in terms of the laws of war, i.e., detaining prisoners of war until the end of the conflict so they do not return to the battlefield. Yet, in reality, President Bush’s treatment of enemy combatants – who are automatically deemed *unlawful* combatants and not necessarily arrested on a battlefield – has been more akin to the treatment of criminals, although without the legal rights provided by the criminal justice system. For instance, in war but not law, it is legitimate to use lethal force on enemy soldiers, but it is also permissible for the enemy troops to fight back.⁵² Yet, because terrorists are viewed more as criminals, they are not privileged to fight back, even though they are being labeled “combatants.” Furthermore, neither prisoners of war nor criminal suspects can be interrogated incommunicado for long periods of time. Yet, as will be discussed in Chapter III, isolated and prolonged interrogation is the primary rationale for the Bush Administration’s enemy combatant policy. As Law Professor David Luban notes: “By selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of a military adversary, as well as the rights of

⁵¹ Samuel Issacharoff and Richard Pildes, “Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,” in *The Constitution in Wartime*, ed. Mark Tushnet (Durham and London: Duke University Press, 2005), 181.

⁵² David Luban, “The War on Terrorism and the End of Human Rights,” in *The Constitution in Wartime*, ed. Mark Tushnet (Durham and London: Duke University Press, 2005), 219-220.

innocent bystanders caught in the crossfire.”⁵³ In other words, the Bush Administration’s approach to fighting terrorism seems to be a hybrid approach borrowing language from the laws of war to treat enemy combatants worse than criminals. Professor Luban describes the fate of Bush’s enemy combatants as in a “limbo of rightlessness.”⁵⁴ Such an approach is not necessarily an unwise strategy, but it does have serious consequences for creating a system of preventive detention. This chapter discusses whether the conflict with al Qaeda should truly be thought of as a war and the implications for preventive detention if it is treated as such.

B. WHAT IS AN ENEMY COMBATANT?

While the Bush Administration has referred to captured terrorists since 9/11 as enemy combatants, the term “enemy combatants” is legally meaningless.⁵⁵ As Law Professor Howard Ball explains, the term “*enemy* combatant” (as opposed to lawful or unlawful combatant) “had no place in the lexicon of military justice” until President Bush’s declaration of the War on Terrorism after 9/11:⁵⁶

With the declaration of the war on terror, the administration no longer saw the need to distinguish between lawful and unlawful combatants, or between combatants and innocent civilians. *All* those captured or handed over to the U.S. military and held by the United States, whether in Iraq, Afghanistan, or in the special facilities quickly created at Guantanamo Bay Naval Station, were “enemy combatants,” and they were not entitled to any of the protections afforded captured enemy prisoners. *There were no innocents and no prisoners of war in the war on terror.*⁵⁷

⁵³ Luban, “The War on Terrorism and the End of Human Rights,” 221.

⁵⁴ *Ibid.*, 221-222.

⁵⁵ Ball, *Bush, the Detainees and the Constitution*, 7.

⁵⁶ *Ibid.*, 42.

⁵⁷ *Ibid.* (Emphasis in original).

Gary Solis, an expert in military law, explains that, until it was used by the Attorney General after September 11, the term “enemy combatant” did not appear in the U.S. criminal code, international law, or law of war.⁵⁸ Rather, according to domestic and international law, detained individuals during a war are either lawful or unlawful prisoners of war (POWs or combatants) or innocent civilians. Under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Conventions), lawful prisoners of war or combatants are allowed to be held until the duration of the conflict (but removed from the battlefield) and must be repatriated at the end of the hostilities. While detained, they are entitled to specific privileges such as food, medical care, religious and intellectual pursuits, and even payment.⁵⁹ Significantly, besides names, ranks, dates of birth, and serial numbers, they may not be interrogated.⁶⁰ A lawful POW or combatant is a person who (1) is in uniform; (2) is openly carrying arms; (3) is waging war under a structured military hierarchy; and (4) is waging war according to the customs and laws of war.⁶¹

Conversely, unlawful POWs, such as spies, saboteurs, or individuals who act in violation of international laws of war, are not entitled to such rights (although they must be treated humanely) and can be tried and punished in accordance with the detaining power’s military or criminal codes.⁶² Significantly, in order to determine whether a detainee is a lawful POW, unlawful POW, or an innocent civilian (not a combatant at all), the capturing state must convene an Article 5 hearing by a “competent tribunal” to determine the appropriate status. Until the Article 5 hearing occurs, “such persons shall

⁵⁸ Luban, “The War on Terrorism and the End of Human Rights,” 223. While the phrase “enemy combatant” was used once by the Supreme Court in *Ex Parte Quirin*, 317 U.S. at 31, to describe saboteurs who did not wear uniforms, the issue in *Ex Parte Quirin* was where the saboteurs were to be tried (i.e., by military tribunals or civilian courts) – not whether they could be held indefinitely and preventively due to their status as enemy combatants. In other words, while the phrase “enemy combatant” was used by the Supreme Court in 1942, its context and ensuing implications were starkly different than how the term is being used in the war on terror. *Ex parte Quirin* will be discussed in more detail in Chapter IV.

⁵⁹ Geneva Convention (III) Relative to the Treatment of Prisoners of War, (August 12, 1949), 6 U.S.T. 3316, 75 U.N.T.S. 135, A.21-32 (safety, quarters, food, clothing, medical care); A.34-38 (religious, intellectual, physical pursuits); A.49-57 (labor); A.60 (payment); A.69-77 (correspondence).

⁶⁰ Ball, *Bush, the Detainees and the Constitution*, 43. See also n. 12.

⁶¹ *Ibid.*, 41.

⁶² *Ibid.*, 7, 43.

enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”⁶³ The United States conducted Article 5 hearings during the Korean War, Vietnam War, and first Gulf War against Iraq. Yet, after 9/11, the Bush Administration decided that anyone captured was an enemy combatant and could not be a POW or innocent civilian.

C. WARRIORS OR CRIMINALS?

One obvious question is whether the conflict with al Qaeda is truly a war or whether some other way of understanding the conflict would prove beneficial. In 1998, Osama bin Laden issued a fatwa stating that it was “an individual duty for every Muslim” to kill Americans and their allies, including civilians.⁶⁴ On September 11, 2001, al Qaeda murdered 3,000 civilians from fifty different countries when al Qaeda operatives hijacked and crashed four airplanes into the World Trade Center, Pentagon, and a field in Pennsylvania. In February 2003, bin Laden wrote “that targeting the Americans and Jews by killing them in any corner of the earth, is the greatest of obligations and the most excellent of ways to gain [the] nearness of Allah.”⁶⁵ Furthermore, evidence suggests that al Qaeda intends on procuring and using weapons of mass destruction.⁶⁶ Investigators in Britain obtained “the Encyclopedia of the Jihad” which contains two volumes devoted specifically to nuclear, radiological, biological and chemical weapons.⁶⁷ It certainly appears that America is at war with al Qaeda. Yet, upon scrutiny, it is necessary to analyze the implications for calling this conflict a war – especially in the context of preventive detention – when war has historically been fought against very different kinds of adversaries.

⁶³ Third Geneva Convention, A.5.

⁶⁴ Osama bin Laden et al., “Declaration of the World Islamic Front for Jihad against the Jews and Crusaders,” *Al-Quds al-Arabi*, February 23, 1998.

⁶⁵ *Waaqiah* (Internet), February 14, 2003 quoted in Anonymous, *Imperial Hubris: Why the West is Losing the War on Terror* (Dulles, VA: Bassey’s Inc., 2004), 148.

⁶⁶ *Ibid.*, 61.

⁶⁷ Laura Donohue, “Britain’s Counterterrorism Policy,” in *How States Fight Terrorism*, eds. Doron Zimmermann and Andreas Wenger, (London: Lynne Rienner Publications, 2007), 47.

War has traditionally been fought by states with soldiers who wear uniforms and who have a territory to defend. In 1977, some countries – although not the United States – ratified Protocol I to the Geneva Conventions to give POW status and other legal protections of the laws of war to members of resistance or guerilla groups who intentionally did not distinguish themselves from the civilian population except when actually engaged in an attack.⁶⁸ America as well as Israel and Britain objected to signing the Protocol, arguing that it would enable terrorist organizations to be recognized as combatants, thereby allowing them to be granted the rights of prisoners of war.⁶⁹ Furthermore, under Protocol I, the groups must be fighting “against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁷⁰ Even if al Qaeda could argue that it was exercising its right of self-determination, it has not requested a declaration seeking such a status and it has not assumed the rights and obligations under Article 96 of that Protocol.⁷¹

Terrorists such as al Qaeda operatives are nonstate actors who do not wear uniforms, do not distinguish themselves before an attack but purposefully try to blend into the population, are not considered an insurgent or guerrilla group with specific territorial ambitions, do not operate in conventional military units, and, most significantly, do not seek to attack its enemy’s military on a battlefield. Rather, al Qaeda’s primary objectives are to launch surprise attacks on *civilian* targets. As Law Professor Peter Berkowitz explains, “the main cause of difficulty today is that the laws of war were developed with a particular conception of war in mind – involving states with incentives to engage in reciprocal restraint – that does not apply to the conflict with the United States’ new adversaries.”⁷²

⁶⁸ Robert Chesney and Jack Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models,” *Stanford Law Review*, 60 (February 2008): 1093.

⁶⁹ Emanuel Gross, “Democracy in the War against Terrorism – the Israeli Experience,” *Loyola Los Angeles Law Review*, 35, 1161 (June 2002): 1191.

⁷⁰ Monica Hakima, “International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide,” *Yale Journal of International Law*, 33 (Summer 2008): 378.

⁷¹ *Ibid.*, n. 36.

⁷² Peter Berkowitz, “Introduction,” in *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz (Stanford, CA: Hoover Institution Press Publication, 2005), x.

There are three main challenges with calling the conflict with al Qaeda a war and attempting to apply the traditional laws of war to this conflict. First, unlike traditional wars, the hostilities are not limited to any battlefield but can occur in the middle of otherwise peaceful civilian areas. As journalist Benjamin Wittes observes, “given that al Qaeda does not fight along a front but seeks to infiltrate American society and destroy it from within, how can one reliably distinguish between combatants and mere sympathizers, or even uninvolved parties caught in the wrong place at the wrong time.”⁷³ Wittes’ concerns are only magnified by the Bush Administration’s (initial) refusal to convene Article 5 tribunals to determine a detainee’s status.⁷⁴ Hence, to fight this conflict, the battlefield becomes the entire world. As law professors Robert Chesney and Jack Goldsmith note, traditionally the “main criterion for military detention was some form of associational status” and that “erroneous detentions were rare” because captured soldiers wore uniforms and “were usually keen to obtain POW status.”⁷⁵ Conversely, al Qaeda operatives have no incentive to admit an association with al Qaeda and have “every incentive to insist that a mistake” has been made.⁷⁶ Considering the intentional clandestine nature of al Qaeda operatives, their purposeful blending into the society they wish to attack, and the fact that arrests are made in civilian areas (not just an active zone of combat), the risk of detaining an innocent civilian as an enemy combatant seems higher than traditional wars fought on battlefields. As Law Professor Monica Hakima observes, there is a “substantial risk that any counterterrorism detention regime will capture a disproportionately high number of innocents.”⁷⁷ Without judicial oversight – a hallmark of democracy – how does the executive branch know it has actually detained a

⁷³ Benjamin Wittes, “Judicial Baby-Splitting,” in *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz (Stanford, CA: Hoover Institution Press Publication, 2005), 116.

⁷⁴ As discussed in Chapter IV, after the Supreme Court decision in *Hamdi*, the government must now provide an opportunity for a detainee to challenge the designation of an enemy combatant in a neutral forum. The forum, however, can be a military tribunal in the executive branch and does not have to afford the detainees the same rights afforded defendants in criminal trials.

⁷⁵ Chesney and Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models,” 1099.

⁷⁶ *Ibid.*, 1100.

⁷⁷ Hakima, “International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide,” 380.

terrorist when it subjects the individual to its preventive detention regime? Law Professor Eric Freedman observes, “[t]he difference between a government that acts on what it ‘knows’ and a government that is required to prove its charges in adversarial proceedings before a neutral tribunal is the difference between a government of laws and a police state.”⁷⁸

Second, as explained above, all members of al Qaeda or the Taliban are automatically unlawful prisoners of war and as such may be detained because of their membership in the enemy group rather than their individual conduct. Because President Bush decided that the Geneva Conventions do not apply to al Qaeda or the Taliban, there is no way for an al Qaeda operative to be considered lawful – by definition he/she is understood to be more like a criminal, although without any legal rights of the criminal justice system. Wittes notes: “The premise of detention in traditional warfare is that the warring parties have no issue with the individual soldier detained, who is presumed to be honorable. That premise is simply false in the current war, in which America’s battle is very much against the individual jihadist. After all, unlike, say, Germany or Japan, al Qaeda is nothing more than a sum of its members.”⁷⁹

There are compelling reasons for concluding that al Qaeda members should not get the privileges of the Geneva Conventions – after all, the Geneva Conventions are contracts between sovereign nations who can negotiate treaties.⁸⁰ While an argument can be made that the Geneva Conventions have become customary international law and therefore applicable to non-signatories, the “laws of war” are premised upon the notion of reciprocal restraint and commitment to minimize civilian deaths. Considering al Qaeda’s modus operandi is to maximize civilian death and injury and its idea of reciprocal restraint is to sever heads, there is no reason to offer its members lawful prisoner of war status when captured. Nonetheless, an Article 5 tribunal or equivalent would still be needed because a detainee could claim he was a civilian and not a combatant at all (as did

⁷⁸ Eric Freedman, “Who’s Afraid of the Criminal Law Paradigm in the ‘War on Terror,’” *New York City Law Review*, 10 (Summer 2007): 328.

⁷⁹ Wittes, “Judicial Baby-Splitting,” 116-17.

⁸⁰ The Bush Administration has held that al Qaeda members will, nonetheless, be treated humanely in accordance with international law.

Hamdi). In any event, concluding that all al Qaeda members are automatically unlawful enemy combatants – when they can never be lawful – seems problematic. A better approach would be to maintain that the Geneva Conventions do not apply to the conflict with terrorist groups – they are neither lawful nor unlawful enemy combatants because they are not “combatants” at all. Before 9/11, terrorists were never understood to be combatants but merely criminals.

A third challenge with understanding the conflict with al Qaeda as a war is recognizing when it is definitively over. Terrorist groups, especially al Qaeda, are unlikely to negotiate a surrender or cease-fire. Wittes questions: “In a conflict with a shadowy, international, nonhierarchical, nonstate actor as enemy, what would victory look like if we achieved it.?” Former Defense Secretary Donald Rumsfeld has stated that the war on terrorism will be over when there are no longer any terrorist organizations of potentially global reach for the terrorists to join.⁸¹ Former federal prosecutor Andrew McCarthy aptly notes, “[t]he war on terror is not like other wars. No war has a determinate end, but this one *does not have a foreseeable ending scenario*.”⁸² According to the 1993 *National Strategy for Combating Terrorism*, victory is defined as the achievement of a world in which terrorism does not define the daily lives of Americans and their friends and allies.⁸³ Yoo also proposes an end to the conflict: “[v]ictory does not come from defeat of the enemy’s forces and eventually a negotiated political settlement, rather it comes from demoralizing an enemy’s society and coercing it to take desired action.”⁸⁴ Yet, on some level, these endings of terrorism seem unsatisfying and impossible to measure and recognize.

⁸¹ David Cole, “Trading Liberty for Security after September 11,” *Foreign Policy in Focus*, September 2002, <http://www.fpif.org/papers/post9-11.html> (accessed March 30, 2008).

⁸² Andrew McCarthy, “A Quick Way Forward after Boumediene,” *National Review*, June 16, 2008, <http://article.nationalreview.com/?q=ZGEwMTY5YTU3NGRiOWUyMzkxZTU3MDElZWUwMDYxOTM=> (accessed June 24, 2008) (Emphasis added).

⁸³ White House, *National Security Strategy of the United States of America* (Washington, DC: White House, 2003), 12.

⁸⁴ John Yoo, “Enemy Combatants and Judicial Competence,” in *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz, (Stanford, CA: Hoover Institution Press Publication, 2005), 72.

Importantly, Harvard Professor Philip Heymann notes that “terrorism is not a threat that is temporary [because] we cannot count on ending a phenomenon that can be brought about by any small group in a world of seven billion people.”⁸⁵ Terrorism expert Martha Crenshaw suggests that “measuring success may not be possible, especially if one considers the number and variety of actors that could practice terrorism.”⁸⁶ Similarly, Professor Ackerman observes that “[t]here are more than six billion people in the world – more than enough to supply terrorist networks with haters, even if the West does nothing to stir the pot. Thus, if we choose to call this a war, it will be endless.”⁸⁷ Georgetown Law Professor David Cole notes that “[t]his war is permanent, and we will be living with the choices we make today for the rest of our lives.”⁸⁸

Significantly, the U.S. State department has designated terrorist groups into three different classifications: (1) foreign terrorist organizations (FTO) (foreign organizations that are designated by the Secretary of State in accordance with the Immigration and Nationality Act); (2) terrorist exclusion list (TEL) (a list of terrorist organizations for immigration purposes);, and (3) other terrorist organizations (OTO) (selected terrorist groups also deemed of relevance in the global war on terrorism.)⁸⁹ As of August 2007, there were 42 FTOs, 58 TELs, and 39 OTOs (although 28 are overlaps).⁹⁰ Therefore, it appears we are at war with 111 different terrorist groups, 54 of which appear to be motivated by Islamic extremism (defined as wanting to create an Islamic state).

In other words, this war on terror appears indefinite. Saying we are fighting a war on terror with 111 different enemies, labeled by the U.S. State Department, assures the American public that the war will never end. Israel has been a perpetual state of war since

⁸⁵ Philip B. Heymann, *Terrorism, Freedom and Security, Winning Without War* (Cambridge, MA and London, England: The MIT Press, 2003), xii.

⁸⁶ Martha Crenshaw, “Terrorism, Strategies and Grand Strategies,” in *Attacking Terrorism: Elements of a Grand Strategy*, eds. Audrey Cronin and James Ludes (Washington, DC: Georgetown University Press, 2004), 90.

⁸⁷ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 6.

⁸⁸ Cole, “Trading Liberty for Security after September 11.”

⁸⁹ Memorial Institute for Prevention of Terrorism (MIPT), “Terrorism Knowledge Base,” <http://www.mipt.org/TKB.asp> (accessed August 2007; site now discontinued).

⁹⁰ Ibid.

its founding in 1948. As Israeli Chief Justice Aharon Barak has astutely noted, “[t]he line between war and peace is thin – what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long term.”⁹¹ Therefore, calling the present conflict with al Qaeda a war is problematic, and having policies such as the enemy combatant policy based on an assumption that it is a war may divert America’s attention from other solutions to the real long-term threat of terrorism. In other words, when it comes to preventive detention, thinking about this conflict as a war may lead America down the wrong path to unsound and perhaps unlawful policies.

Given these significant differences between traditional war and the war on terror, Bush’s enemy combatant policy has staggering implications. While lawful prisoners of war are repatriated at the end of a conflict and unlawful prisoners of war are tried for their crimes, Bush’s enemy combatants – who are automatically unlawful prisoners of war and not necessarily caught on a battlefield – can be held indefinitely for a war that may never end. Is the indefinite threat of terrorism really worth the sacrificing of America’s democratic principles? It seems more prudent for America to provide a more well thought out and nuanced solution to preventive detention that can be sustainable in the long run, which means fundamentally rethinking its enemy combatant policy.

President Bush’s 2006 *National Security Strategy* states that the strategy is founded on two pillars, the first one being to “promot[e] freedom, justice, and human dignity [and] to promote effective democracies.”⁹² Similarly, in the 2006 *National Strategy for Combating Terrorism*, President Bush states that “[n]ot only do we fight our terrorist enemies on the battlefield, we promote freedom and human dignity as alternatives to the terrorists’ perverse vision of oppression and totalitarian rule.”⁹³ Such language seems to be incongruous with the enemy combatant policy whereby the

⁹¹ Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy,” *Harvard Law Review*, 116 (2002): 149.

⁹² White House, *National Security Strategy of the United States of America* (Washington, DC: White House, 2006).

⁹³ White House, *National Strategy for Combating Terrorism* (Washington, DC: White House, 2006), 1.

President can unilaterally detain terrorist suspects without trial through the end of a conflict that may never end for purposes of interrogation without lawyers or Miranda protections.

Recognizing this conflict with al Qaeda is different than traditional war is not to suggest that terrorism does not pose a significant threat to national security. Rather, it suggests that using the language of the laws of war and framing al Qaeda operatives as enemy combatants may not ultimately be an effective way of winning or resolving this conflict and may in fact serve to undermine America's objectives as articulated above in its national strategies. As Heymann notes: "'War' is neither a persuasive description of the situation we face nor an adequate statement of our objectives. It misleads us as to the means that we will have to use."⁹⁴ Interestingly, even former Defense Secretary Donald Rumsfeld had second thoughts about labeling the conflict with al Qaeda as a war: "I don't think I would have called it the 'war on terror.' . . . I've worked to reduce the extent to which that [label] is used and increased the extent to which we understand it more as a long war, or a struggle, or a conflict not against terrorism but against a against a relatively small number of terribly dangerous and violent extremists."⁹⁵

Some law professors and policy makers have argued that the threat of terrorism is overblown and that terrorists should be treated as criminals and arrested and tried using the criminal justice system. Professor Ian Lustick argues in *Trapped in the War on Terror* that the "War on Terror preoccupies our people, distracts them and our political system from real problems and real solutions, and embroils us in unwinnable, demoralizing conflicts."⁹⁶ He asserts that the "War on Terror destroys the standing and reputation of the United States in the Muslim world, thereby turning our efforts in the name of freedom and the victims of 9/11 into more power and more opportunity for Islamic radicals."⁹⁷ Alternatively, Lustick argues that America should treat terrorists as

⁹⁴ Heymann, *Terrorism, Freedom and Security, Winning Without War*, 19.

⁹⁵ Cal Thomas, "For Rumsfeld, 'War on Terror' is Misleading Label," *Chicago Tribune*, December 12, 2006.

⁹⁶ Ian Lustick, *Trapped in the War on Terror* (Philadelphia: University of Pennsylvania Press, 2006), 127.

⁹⁷ *Ibid.*

criminals: “Instead of glorifying terrorist groups as enemies of civilization on the order of the Axis powers, we should follow Europe’s example by treating terrorists as the dangerous but politically insignificant criminals they would be without our help.”⁹⁸

Former Supreme Commander of NATO Wesley Clark agrees:

Labeling terrorists as combatants also leads to this paradox: while the deliberate killing of civilians is never permitted in war, it is legal to target a military installation or asset. Thus the attack by Al Qaeda on the destroyer Cole in Yemen in 2000 would be allowed, as well as attacks on command and control centers like the Pentagon. For all these reasons, the more appropriate designation for terrorists is not “unlawful combatant” but the one long used by the United States: *criminal*.⁹⁹

Historically, terrorists such as Timothy McVeigh and Theodore Kaczynski have been treated as criminals. Furthermore, the 1993 bombing of the World Trade Center, the simultaneous bombings of the American embassies in Kenya and Tanzania as well as the 2000 attack on the USS *Cole* did not transform the conflict with al Qaeda into a war. During the Clinton Administration, arrests of suspected al Qaeda operatives led to more than thirty successful prosecutions in federal courts.¹⁰⁰ As Rosenau notes, “law enforcement, and specifically the practice of apprehending terrorists and bringing them to trial, remained Washington’s preferred instrument for combating al-Qaida” during the Clinton Administration.¹⁰¹ From 1993 to 1999, the number of FBI agents working on terrorism rose from 550 to 1,400.¹⁰² Defense attorney Joshua Dratel notes that the criminal justice system pre-9/11 was successful because it “incapacitated a significant number of people in terms of jail and conviction” and produced “reliable and valuable

⁹⁸ Lustick, *Trapped in the War on Terror*, 137.

⁹⁹ Wesley K. Clark and Kal Raustiala, “Why Terrorists Aren’t Soldiers,” *New York Times*, August 8, 2007, <http://www.nytimes.com/2007/08/08/opinion/08clark.html> (accessed June 26, 2008) (Emphasis added).

¹⁰⁰ Crenshaw, “Terrorism, Strategies and Grand Strategies,” 82.

¹⁰¹ Rosenau, “U.S. Counterterrorism Policy,” 137.

¹⁰² Paul Pillar, *Terrorism and U.S. Foreign Policy* (Washington, DC: Brookings Institution, 2003), 80.

intelligence” that “did not offend the conscience of the nation.”¹⁰³ Other countries such as England, Spain, France, and Indonesia label terrorists as criminals and subject them to their respective criminal codes.¹⁰⁴ Israel, on the other hand, views terrorism as acts of war and asserts its right to apply the laws of war including the right of preemptive action.¹⁰⁵ Thus, there is precedent for viewing aspects of the conflict as a war. (Chapter V will discuss Israel’s experience with preventive detention in its dealings with terrorism.)

Significantly, in the United States, the Bush Administration has used both its language of war and the criminal justice system to prosecute its enemy combatants. Most telling is the case of Padilla who is serving seventeen years for conspiracy-related terrorism charges after being detained three and one-half years as an enemy combatant. Significantly, the Bush Administration stated that, should Padilla be acquitted of the criminal charges, the Administration reserved the right to detain him again indefinitely as an enemy combatant.¹⁰⁶ So, in essence, the Bush Administration’s enemy combatant policy works in conjunction with the criminal justice system. Terrorism is apparently such a grave threat that the Administration is allowed to unilaterally decide when to use the criminal justice system and when to use aspects of the laws of war – and change course when one method does not produce the desired result without any oversight by Congress or the judicial branch.

Yet, al Qaeda *does* pose a greater challenge than ordinary criminals who are motivated out of personal and financial gain. Yoo characterizes 9/11 as a “classic decapitation strike designed to eliminate the political, military, and financial leadership of the country.”¹⁰⁷ As terrorism expert Bruce Hoffman notes “the ordinary criminal’s

¹⁰³ Center of Law and Security at NYU School of Law, “Prosecuting Terrorism: The Legal Challenge,” *The NYU Review of Law and Security*, no. 7 (April 2006): 23-24, www.lawandsecurity.org/publications/no.7ProsecutingTerrorismtheLegalChallenge.pdf (accessed June 26, 2008).

¹⁰⁴ Ball, *Bush, the Detainees and the Constitution*, 6.

¹⁰⁵ Jonathan B. Tucker, “Strategies for Countering Terrorism: Lessons from the Israeli Experience,” www.homelandsecurity.org/journal/articles/tucker-israel.html (accessed June 26, 2008).

¹⁰⁶ Ball, *Bush, the Detainees and the Constitution*, 27.

¹⁰⁷ Yoo, “Enemy Combatants and Judicial Competence,” 71.

violent act is not designed or intended to have consequences or create psychological repercussions beyond the act itself” whereas “the fundamental aim of the terrorist’s violence is ultimately to change ‘the system’ – about which the ordinary criminal, of course, couldn’t care less.”¹⁰⁸ Furthermore, a significant aspect of the conflict with al Qaeda is that “it is a wholly foreign threat that emanates from outside the United States” and “seeks purely political ends.”¹⁰⁹ Law professors Goldsmith and Chesney note that when the United States seeks to prosecute an individual situated overseas, its practical alternatives for securing the defendant, such as extradition through a possible treaty or diplomacy, are limited. As they explain, the United States tried to locate bin Laden and other high level al Qaeda leaders in Afghanistan before 9/11 but was obviously ineffective.¹¹⁰

Therefore, America’s intelligence and military must play a role in disrupting terrorist operations, especially when another country such as Afghanistan harbors terrorist groups. Besides Afghanistan and Iraq, America has conducted operations against al Qaeda in Yemen, Philippines and parts of Africa.¹¹¹ Furthermore, al Qaeda has unequivocally stated its intent on procuring and using weapons of mass destruction. Pulitzer Prize winning journalist Ron Suskind recounts in *The One Percent Doctrine* how Osama bin Laden inquired from a Pakistani nuclear scientist about “nuclear logistics” and asked the scientist: “What if you already have the enriched uranium?”¹¹² Considering al Qaeda succeeded in killing 3,000 people and causing billions of dollars in damage by converting airplanes into missiles, treating al Qaeda as mere criminals would be to seriously undermine its capabilities and intent. Significantly, after 9/11, the priority became **preventing** future terrorist attacks, which requires information and intelligence, and not merely the prosecution of terrorists after the attacks. In other words, the conflict with al Qaeda requires more and different resources than the criminal justice system,

¹⁰⁸ Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 1998), 41-42.

¹⁰⁹ Yoo, “Enemy Combatants and Judicial Competence,” 74-75.

¹¹⁰ Chesney and Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models,” 1096.

¹¹¹ Yoo, “Enemy Combatants and Judicial Competence,” 73.

¹¹² Suskind, *The One Percent Doctrine*, 70.

which focuses on gathering admissible evidence for prosecution after an attack, can provide. At times, the military will need to be engaged, and international diplomacy and cooperation, including the sharing of intelligence, with other countries must play significant role in this endeavor.

So what should America call this conflict? Lustick asserts that what America needs is “not a new name for the war we are trapped within but a fundamentally new approach to the problem.”¹¹³ Immediately after 9/11, French President Jacques Chirac questioned whether “war” was the right word to describe the conflict and observed that we faced a “conflict of a completely new nature.”¹¹⁴ Calling the conflict with al Qaeda a “war” would not be so problematic if America developed new methods for dealing with this threat instead of trying to manipulate old tools to fit this new problem. Addressing Congress in 1862, President Lincoln stated: “The dogmas of the quiet past are inadequate for the stormy present. The occasion is piled high with difficulty, and we must rise to the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.”¹¹⁵ While the Civil War certainly presented a bigger threat to America than this war on terror, Lincoln’s point is well taken: we need to think anew, and if preventive detention is truly needed as a tool in this war on terror, then we need a new system for preventive detention that incorporates more due process and is, overall, more sustainable than the current enemy combatant policy.

The United States should not be forced to view the conflict with al Qaeda as either a war or a criminal justice problem. Ackerman makes a compelling argument in *Before the Next Attack* that neither the language of war nor that of the criminal justice system is adequate to understand the conflict with terrorism. Ackerman rejects the “war” terminology because it “tilts the constitutional scales in favor of unilateral executive action, and against our tradition of checks and balances.”¹¹⁶ He similarly finds criminal

¹¹³ Lustick, *Trapped in a War on Terror*, 129.

¹¹⁴ Suskind, *The One Percent Doctrine*, 19.

¹¹⁵ Abraham Lincoln, Annual Message to Congress, December 1, 1862, quoted in Mark Tushnet, “Emergencies and the Idea of Constitutionalism,” in *The Constitution in Wartime*, ed. Mark Tushnet (Durham and London: Duke University Press, 2005), 40.

¹¹⁶ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 5.

law to be fundamentally inadequate to deal with terrorism because terrorism – unlike crime – “aims to destabilize a foundational relationship between ordinary citizens and the modern state: the expectation of *effective sovereignty*.”¹¹⁷ Ackerman asserts that “the normal operation of the criminal law *presupposes* the effective sovereignty of the state, but a major terrorist attack *challenges* it.”¹¹⁸ Hence, Ackerman argues that September 11 and the threat of terrorism justifies the creation of a “state of emergency” as an alternative to the state of war:¹¹⁹

So neither “war” nor “crime” is really adequate. War does express the public affront to national sovereignty left in the aftermath of a successful terrorist attack. But war talk threatens all of us with arbitrary power exercised without the restraint of legal safeguards developed over centuries of painful struggle. “Crime” has proved itself adequate when dealing with dangerous conspiracies, but only within a social context that presupposes the government’s effective sovereignty. What is required is a third framework which confronts the distinctive interest that comes into play in the aftermath of a terrorist attack.¹²⁰

Similarly, Law Professor Mark Tushnet argues that the war on terror should instead be thought of a “condition”:

The already long duration of the “war on terrorism” suggests that we ought not think of it as a war in the sense that the Second World War was a war. It is, perhaps, more like a condition than a war – more like the war on cancer, or the war on poverty, or, most pertinently, the war on crime. Suspending legality during a time-limited war is one thing. Suspending it during a more or less permanent condition is quite another. The latter is the end of rule of law itself.¹²¹

¹¹⁷ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 42. (Emphasis in original).

¹¹⁸ *Ibid.* (Emphasis in original).

¹¹⁹ *Ibid.*, 43.

¹²⁰ *Ibid.*, 44.

¹²¹ Mark Tushnet, “Emergencies and the Idea of Constitutionalism,” in *The Constitution in Wartime*, ed. Mark Tushnet, (Durham and London: Duke University Press, 2005), 45.

Appellate Judge Richard Posner posits that the dichotomy between calling the conflict “war” versus “crime” is “semantic” and suggests: “Rather than ask whether modern terrorism is more like crime or more like war and therefore which box it should be put in, one should ask why there are different legal regimes for crimes and war and let the answer guide the design of a sensible regime for fighting terrorism.”¹²²

To this end, law professors Chesney and Goldsmith address the underlying reasons for the different legal regimes for crimes and war in their law review article entitled *Terrorism and the Convergence of Criminal and Military Detention Models*. In their article, they discuss how neither the traditional criminal and military detention models can meet the “central legal challenge of modern terrorism,” which they describe as “the legitimate and preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act.”¹²³ They summarize the problems with the criminal and military detention models for detaining terrorists as follows:

The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because it has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.¹²⁴

Therefore, they too, like Ackerman, Posner, and Tushnet recognize that terrorism cannot be dealt with by viewing the problem as either crime or war but requires a fundamentally new way to understand the problem.

¹²² Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006), 72.

¹²³ Chesney and Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models,” 1081.

¹²⁴ *Ibid.*

The next question to be addressed is whether terrorism – no matter what it is called – is really that dangerous as compared to previous threats that America has faced since its inception, or rather it is just a perception of danger that has caused the ostensible need for preventive detention.

D. UNDERSTANDING THE THREAT LEVEL

While historically the United States has suspended civil rights and liberties during times of war (i.e., Alien and Sedition Acts of 1798 during undeclared naval war with France, President Lincoln suspending habeas corpus during the Civil War, Palmer raids during WWI, Japanese internment camps during WWII), the understanding was that these infringements on civil liberties would be *temporary*. Supreme Court justices Brennan and Rehnquist have observed “a recurring cycle in American history: a government crackdown on civil liberties during the crisis that is sustained by the courts, followed by a judicial reconsideration once the crisis has passed, and then forgetfulness when the next crisis emerges.”¹²⁵ Although the war on terror appears indefinite, the Bush Administration has not addressed any return to “constitutional normalcy.”¹²⁶ As Heymann argues, “we cannot allow such small and hostile groups to impose on us for decades the costs we would be prepared to bear for a few years to protect ourselves against the vast powers of an advanced foreign state.”¹²⁷

While the overall legality/constitutionality of President Bush’s enemy combatant policy is presently unclear (see Chapter IV), it seems that as the threat level diminishes and America does not suffer another catastrophic terrorist attack, there is a greater chance the enemy combatant policy will ultimately be found to be unconstitutional. Although the fate of Hamdi and Padilla have been resolved, the fate of al-Marri is currently pending an evidentiary hearing and will likely end up at the Supreme Court. An interesting question is to what extent the current threat level at the time of the decision

¹²⁵ Seth Waxman, “Combatant Detention through the Lenses of History,” in *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz (Stanford, CA: Hoover Institution Press Publication, 2005), 4.

¹²⁶ Ball, *Bush, the Detainees and the Constitution*, 32.

¹²⁷ Heymann, *Terrorism, Freedom and Security, Winning Without War*, xii.

will affect the analysis in al-Marri. It seems more prudent to have a policy for preventive detention that can *incorporate* the present threat level as opposed to having its underlying legitimacy and legality being decided based on the threat level. In other words, America needs a more resilient preventive detention policy that can withstand a change in the threat level posed by different terrorist groups.

Because terrorism appears to be an indefinite threat, America needs a way of evaluating the threat level at any particular time and tailoring its policies accordingly. As Heymann notes, “[h]ow dangerous a situation is depends not only on how bad it is currently . . . but also on how likely the situation is to get worse.”¹²⁸ Ackerman argues that “[w]hen terrorists strike at 9/11 scale, *nobody has the slightest idea of what will happen next*” and that the “resulting anxiety is qualitatively different from many of the other uncertainties in life.”¹²⁹ Law professors Adrian Vermeule and Eric Posner argue that whether the “government justifiably detains al Qaeda suspects without charging and trying them depends to a large extent on the magnitude of the threat”¹³⁰ So how can America measure the threat?

One key way may be the National Intelligence Estimates (NIEs) that are currently produced by the National Intelligence Council and the Director of National Intelligence (DNI). The NIEs are the DNI’s most authoritative written judgments concerning national security issues. They contain the coordinated judgments of the intelligence community regarding the likely course of future events. In July 2007, the NIE concluded that al Qaeda is “likely to continue to focus on prominent political, economic, and infrastructure targets with the goal of producing mass casualties, visually dramatic destruction, significant economic aftershocks, and/or fear among the U.S. population.”¹³¹ Significantly, the NIE also noted that al Qaeda “will continue to try to acquire and

¹²⁸ Heymann, *Terrorism, Freedom and Security, Winning Without War*, 4.

¹²⁹ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 44. (Emphasis in original).

¹³⁰ Eric Posner and Adrian Vermeule, *Terror in the Balance, Security, Liberty and the Courts* (Oxford: Oxford University Press, 2007), 9.

¹³¹ National Intelligence Counsel, *National Intelligence Estimate* (Washington, DC: Director of National Intelligence, July 2007).

employ chemical, biological, radiological, or nuclear material in attacks and would not hesitate to use them if it develops what it deems sufficient capability.”¹³² Yet, as Tushnet and Ackerman noted above, perhaps this threat of terrorism is the new “condition” or “state of emergency” America faces for the indefinite future.

Law Professor Mark Brandon makes an intriguing observation. He maintains that from the American Revolution to the present, the “armed forces of the United States have participated in eighty-four distinct, significant engagements.”¹³³ He posits that six were declared wars, ten were undeclared wars and the rest were significant actions. According to Brandon, military actions have occurred during 80 percent of the life of the nation.¹³⁴ Thus, on some level, America has almost always been in a state of conflict with its enemies. To what extent, if any, is America’s baseline of threat higher now than it has been in the past?

Many experts agree that terrorism – while a serious threat – does not pose an “existential” threat that past conflicts such as the Cold War or Civil War posed to national security. Crenshaw argues that “terrorism does not pose the threat of annihilation that the Soviet Union’s nuclear capabilities did during the cold war.”¹³⁵ She maintains that what is at stake “is not national survival, material power, or the integrity of our armed forces and national defense system but the individual security of American civilians at home.”¹³⁶ Similarly, Rosenau maintains that terrorism does not “pose as existential threat to the United States in the way that Moscow did, armed as it was with tens of thousands of nuclear weapons.”¹³⁷ Ackerman notes that “[t]hough our situation is grave, it is not as grim as the bad old days of the twentieth century, when Hitler and Stalin really did threaten us with physical occupation and political takeover.” Ackerman astutely notes that, although the Cold War presented a graver existential threat than

¹³² National Intelligence Counsel, *National Intelligence Estimate*.

¹³³ Mark Brandon, “War and American Constitutional Order,” in *The Constitution in Wartime*, ed. Mark Tushnet (Durham and London: Duke University Press, 2005), 11.

¹³⁴ *Ibid.*, 11.

¹³⁵ Crenshaw, “Terrorism, Strategies and Grand Strategies,” 76.

¹³⁶ *Ibid.*, 76.

¹³⁷ Rosenau, “US Counterterrorism Policy,” 134.

terrorism, no president bypassed the criminal justice system and labeled domestic Communists as enemy combatants, throwing them into military prison incommunicado for years on end. While he notes that “anti-Communist hysteria wrongfully destroyed countless reputations and careers,” the accused were still provided the “traditional protections of criminal due process.”¹³⁸ Ackerman argues that “[i]f the Cold War anxieties did not overwhelm us, why should war talk justify the use of emergency powers against small bands of terrorists who cannot rely on the massive assistance of an aggressive superpower?”¹³⁹

Nonetheless, although terrorism may not be an existential threat in the same way as the Cold War, terrorism will be a protracted battle where the United States will need to employ all of its instruments of power (i.e., military, economic, diplomatic, law enforcement and intelligence) to contain and possibly win. As explained above, terrorism threatens the political sovereignty of our nation – independent of the mass casualties – and hence merits a different response than criminal law. While deterrence and containment were the strategies used to win the Cold War against state actors, prevention and preemption – which are dependant on accurate intelligence – will be the strategies needed to contain terrorism. Since 9/11, the FBI has been transforming itself from a culture of law enforcement based on gathering evidence and prosecution to a “culture of prevention.”¹⁴⁰ As such, a form of preventive detention may very well be needed for purposes of interrogation to obtain needed intelligence. (This purpose is discussed next in Chapter III). When creating a system of preventive detention, however, terrorist suspects should not be thought of or viewed as combatants but more like criminals. Journalists Wittes and Gitenstein posit, “[t]he proper detention regime for the war on terrorism is a hybrid of different legal structures, drawing on elements of the laws of war and the criminal law and tailored to the unique threat posed by global catastrophic terrorism.”¹⁴¹ The challenge is to create a regime for preventive detention that can

¹³⁸ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 41.

¹³⁹ Ibid.

¹⁴⁰ Rosenau, “US Counterterrorism Policy,” 145.

¹⁴¹ Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 3-4.

balance America's need for intelligence and incapacitation with due process and rights afforded the detainees. In this way, America can contain terrorism while not undermining its democratic principles.

In sum, by using an old framework primarily concerned with state actors to deal with a different and formidable asymmetric threat posed by terrorists risks having the old framework found to be unworkable or unlawful when a system of preventive detention to deal with terrorist suspects may very well be needed. While the current threat is al Qaeda, ten years from now America may be facing a different terrorist adversary. Therefore, America needs a practical and more resilient preventive detention policy that is lawful, adaptable, respectable, and sustainable for the indefinite threat posed by terrorism. As Ackerman notes: "The question . . . is whether we can design a structure that engages the courts, the president, and the Congress in a joint endeavor that – for all its predictable tensions – will generate a more resilient response to the episodic shocks that will surely shake us in the future."¹⁴² Chapter VII discusses a possible solution by having the Foreign Intelligence Surveillance Court system monitor a regime of preventive detention as applied to U.S. persons not arrested in a zone of combat for purposes of interrogation and incapacitation. Before discussing possible alternatives to the enemy combatant policy, however, the underlying rationales or justifications for preventive detention as a tool in this war on terror need to be explored. This analysis will be the topic of the next chapter.

¹⁴² Ackerman, *Preventing the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 66.

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III. RATIONALES FOR PREVENTIVE DETENTION IN THE WAR ON TERROR

An ounce of prevention is worth a pound of cure.

-Ancient proverb¹⁴³

To assess whether preventive detention is needed as a tool in the war on terror, it is important to understand the underlying rationale for preventive detention. While the Bush Administration unilaterally designated Padilla, Hamdi, and al-Marri as enemy combatants and detained them indefinitely with no criminal charges, the Administration did *not* designate the Lackawanna Six (Buffalo terrorist cell), Richard Reid (shoe-bomber), John Walker Lindh (U.S. citizen captured in Afghanistan who pled guilty), Zacarias Moussaoui (20th hijacker in 9/11 attacks) or countless others as enemy combatants but instead used the traditional criminal justice system to prosecute and ultimately detain these individuals. As journalist Adam Liptak noted, “[t]he upshot of that approach . . . is that no one outside the administration knows just how the determination is made whether to handle a terror suspect as an enemy combatant or as a common criminal, to hold him indefinitely without charges in a military facility or to charge him in court.”¹⁴⁴ Hence, one preliminary question is why has the Bush Administration departed from common understandings of due process by designating some suspected terrorists as enemy combatants while prosecuting other suspected terrorists in the criminal justice system.

Because the Bush Administration’s enemy combatant policy was created unilaterally with no input from Congress, there is no legislative history or any single document that can succinctly point to this rationale. Rather, it is necessary to review the Administration’s press releases, books and articles written by proponents of the enemy combatant policy, speeches from individuals within the Bush Administration, and

¹⁴³ This ancient proverb is first recorded in Latin in Henry de Bracton’s *De Legibus* (c. 1240).

¹⁴⁴ Adam Liptak, “In Terror Cases, Administration Sets Its Own Rules,” *New York Times*, November 27, 2005, <http://www.nytimes.com/2005/11/27/national/nationalspecial3/27enemy.html#> (accessed January 27, 2008).

analyses from law professors, policy-makers, and journalists to gauge an understanding of the justification for preventive detention as a tool in the war on terror. As explained below, a review and analysis of such documents points to three plausible reasons for the Bush Administration's enemy combatant policy: interrogation, incapacitation, and difficulties with trying terrorists in federal Article III courts. This chapter discusses these rationales and analyzes to what extent, if any, such rationales can be legitimate reasons for preventive detention.

A. INTERROGATION

A review of the aforementioned literature suggests that interrogation is the principal reason for the enemy combatant policy. As explained in Chapter I, John Yoo, former Deputy Assistant Attorney General under the Bush Administration, was one of the architects of the enemy combatant policy. In 2005 he informed *The New York Times* that “[t]he main factors that will determine how [a terrorist suspect] will be charged . . . are, one, how strong [his] link to Al Qaeda is and, two, whether [he has] any actionable intelligence that will prevent an attack on the United States.”¹⁴⁵ According to Yoo, “[i]nformation is the primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operatives is perhaps the most effective means against preventing future terrorist attacks upon U.S. territory.”¹⁴⁶

During oral arguments in *Hamdi v. Rumsfeld*, Supreme Court Justice Ruth Ginsburg asked Deputy Solicitor General Paul Clement how the government justified treating some terrorist suspects as criminals while others such as Hamdi and Padilla as enemy combatants.¹⁴⁷ Clement's response highlights the primacy of interrogation as a reason for the disparate treatment:

Well Justice Ginsburg, I think that reflects a sound exercise of prosecutorial and executive discretion. There are some individuals who may be captured in a situation where they do not have any particular intelligence value [and therefore] can be dealt with in the [judicial

¹⁴⁵ Liptak, “In Terror Cases, Administration Sets Its Own Rules.”

¹⁴⁶ Yoo, “Enemy Combatants and Judicial Competence,” 84.

¹⁴⁷ Ball, *Bush, the Detainees and the Constitution*, 109.

system]. But there are plenty of individuals who either have a paramount intelligence value [so] that putting them into the [judicial system] immediately and providing them with counsel, whose first advice would certainly be to not talk to the government is a counterproductive way to proceed in these cases.¹⁴⁸

According to the Bush Administration, individuals may be significant intelligence assets, and criminal charges with the ensuing rights to counsel and right to exculpatory material would greatly halt and disrupt interrogation. Under the criminal justice system, once in custody, a defendant must be warned of his rights to counsel and against self-incrimination.¹⁴⁹ Furthermore, a defendant in a criminal proceeding is constitutionally entitled to obtain potentially exculpatory information in the possession of the government.¹⁵⁰ As Yoo explains, introducing a lawyer immediately after capture of an enemy combatant would disrupt interrogation as any competent defense counsel would tell his/her client to remain silent.¹⁵¹ According to former White House Counsel Alberto Gonzales (later the former Attorney General), “[t]he stream of intelligence would quickly dry up if the enemy combatants were allowed contact with outsiders during the course of an ongoing debriefing.”¹⁵² He added that such a result would be “an intolerable cost” and not required by the Constitution.¹⁵³ Rosenzweig and Carafano discuss how “isolation” is one of the “most successful means of productive interrogation.”¹⁵⁴ Judge Posner describes how a “detainee who feels isolated and has no access to a lawyer can more easily be pressured to provide information sought by the government.”¹⁵⁵ In fact, Khalid Sheikh Mohammed (KSM), the mastermind behind 9/11, initially demanded an

¹⁴⁸ Ball, *Bush, the Detainees and the Constitution*, 109.

¹⁴⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁵⁰ *Brady v. Maryland*, 373 U.S. 83, 84-87 (1963).

¹⁵¹ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 151.

¹⁵² Warren Richey, “Beyond Padilla Terror Case, Huge Legal Issues,” *Christian Science Monitor*, August 15, 2007, <http://www.csmonitor.com/2007/0815/p01s08-usju.html> (accessed June 26, 2008).

¹⁵³ *Ibid.*

¹⁵⁴ Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 3.

¹⁵⁵ Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 63.

attorney upon arrest and stated that he would see his captors in court.¹⁵⁶ As explained below, KSM was not provided an attorney and has provided substantial intelligence that has stopped specific terrorist plots. Therefore, one purpose for a preventive detention regime is to interrogate a terrorist suspect in isolation who may prove to be a valuable intelligence asset before criminal charges and the ensuing rights to counsel accrue.

This concern about Miranda protections interfering with needed interrogation is not just theoretical. As explained by FBI agent Coleen Rowley, Zacarias Moussaoui (the 20th hijacker) was in custody on September 11, 2001 due to an immigration violation. Because he had requested a lawyer, however, the FBI was prevented from questioning him when in theory he could have possessed further information about co-conspirators or a second wave of attacks.¹⁵⁷

The situation of Padilla is particularly enlightening on this issue of interrogation as a rationale for preventive detention. Yoo describes Padilla as “an intelligence prize.”¹⁵⁸ Based on information from other captured al Qaeda operatives (discussed below), the Administration had intelligence that Padilla, who was arrested at O’Hare International Airport in 2002, had just come from Pakistan where he had met with high-level al Qaeda operatives with plans to detonate a radioactive bomb in a large U.S. city. Yet, upon arrest, while he had approximately \$10,000 and a cell phone with al Qaeda operatives phone numbers on it, he did not have any of the bomb making equipment or plans on him, and he did not have the expertise to construct such a weapon himself. There were obvious questions that needed to be answered: Where would Padilla, who had an extensive violent criminal record as juvenile, get the money, supplies and expertise to build such a bomb? Where would he get the radioactive material? Were there sleeper al Qaeda cells in the United States?¹⁵⁹ Although Padilla’s attorney argues that Padilla could

¹⁵⁶ Michael Mukasey, “Jose Padilla Makes Bad Law,” *The Wall Street Journal*, August 22, 2007, <http://www.opinionjournal.com/extra/?id=110010616> (accessed June 26, 2008).

¹⁵⁷ Stuart Taylor, “Rights, Liberties, and Security: Recalibrating the Balance after September 11,” *Brookings*, (Winter 2003), www.brookings.edu/articles/2003/winter_terrorism_taylor.aspx?p=1 (accessed June 5, 2008).

¹⁵⁸ Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 139.

¹⁵⁹ *Ibid.*

have been charged with conspiracy or levying war,¹⁶⁰ the Justice Department did not think it could detain Padilla very long in the criminal justice system based on the amount of evidence it had and that Padilla would unlikely reveal his al Qaeda contacts if he knew he was going to be released in matter of months.¹⁶¹ In a June 2004 press release, former Deputy Attorney General James Comey stated:

Had we tried to make a case against Jose Padilla through our criminal justice system, something that I as the United States attorney in New York could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right. He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week and hope -- pray, really -- that we didn't lose him.¹⁶²

Initially, as explained in Chapter I, the government detained Padilla pursuant to a material witness warrant, which allows the arrest of an individual who has information likely to be of interest to a grand jury investigating a crime but whose presence to testify cannot be assured. When it became clear that Padilla could not be detained long-term under the material witness statute, the Administration searched for a new strategy.

President Bush agreed he would designate Padilla an enemy combatant and place him into military custody only if several different government agencies independently agreed that Padilla's situation merited such a response.¹⁶³ After analysis by the FBI, CIA and DoD showed that Padilla had critical intelligence information, President Bush designated him an enemy combatant. Hence, while the decision to declare Padilla an enemy combatant was certainly a unilateral executive branch decision, it appears the decision was made based on an executive branch consensus that Padilla contained vital intelligence. Journalist Wittes observes in his book *Law and the Long War* that "[i]n 2002, no responsible government official could have regarded [Padilla] as anything other

¹⁶⁰ John Richardson, "Is This Man a Monster?" *Esquire*, 126 (June 2008): 130.

¹⁶¹ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 140.

¹⁶² Deputy Attorney General James Comey, remarks concerning Jose Padilla.

¹⁶³ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 140.

than a most extreme threat.”¹⁶⁴ Former Defense Secretary Donald Rumsfeld noted that America’s “primary interest in Padilla right now is to figure out what he may know to help prevent a future attack rather than trying him in court.”¹⁶⁵

During litigation concerning Padilla, the Administration conceded that its primary reason for detaining him as an enemy combatant was to “find out everything he knows.”¹⁶⁶ An official from the Defense Intelligence Agency (DIA) explained during Padilla proceedings that the government’s approach to interrogation is “largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator” and that “even seemingly minor interruptions can have profound psychological impacts of the delicate subject-interrogation relationship.”¹⁶⁷ He also asserted that that “permitting Padilla any access to counsel may substantially harm our national security interests” because Padilla, “as with most detainees . . . is unlikely to cooperate if he believes that an attorney will intercede in his detention.”¹⁶⁸ The DIA official further stated that the interrogation process could take a “significant amount of time” including “years.”¹⁶⁹ In fact, the Fourth Circuit in *United States v. Moussaoui* deferred to the government’s assertion that interruptions to the interrogation process could have “devastating effects on the ability to gather information” and acknowledged that the value of intelligence from al Qaeda operatives in custody could not be “overstated.”¹⁷⁰

While one can argue that interrogation is not a viable reason for preventive detention or that interrogation is ineffective at producing actionable intelligence, it is undeniable that interrogation is the principal reason behind the Bush Administration’s enemy combatant policy. The next question becomes whether, and under what

¹⁶⁴ Wittes, *Law and the Long War*, 180.

¹⁶⁵ “Fed Defend Incarceration of ‘Dirty Bomb’ Suspect,” *CNN*, June 27, 2002, <http://archives.cnn.com/2002/LAW/06/27/dirty.bomb.suspect/> (accessed March 30, 2008).

¹⁶⁶ *Padilla*, 542 U.S. at 464 (citation omitted).

¹⁶⁷ *Padilla*, 243 F. Supp. 2d at 49.

¹⁶⁸ *Ibid.*, 50.

¹⁶⁹ *Ibid.*, 49.

¹⁷⁰ *United States v. Moussaoui*, 365 F.3d 292, 306 (4th Cir. 2004).

circumstances, interrogation can be a legitimate rationale for creating a preventive detention regime as a tool in the war on terror. As will be explained, the answers to these questions are complex, often implicate classified information, and frankly unknown without additional study and analysis.

A minor digression is warranted before addressing these questions: there appear to be three kinds of interrogation methods: (1) torture, which is prohibited by American and international law;¹⁷¹ (2) coercive interrogation, which is legal but has policy implications; and (3) non-coercive interrogation, which is the least controversial but generally takes a substantial period of time to develop relationships of trust and dependency. As Yoo explains, “[p]hysical or mental coercion that does not constitute torture includes threats of poor treatment or promises of better treatment or nonharmful physical contact.”¹⁷² A discussion of which tactics constitute torture and are, therefore, unlawful and which tactics are coercive but remain legal is beyond the scope of this paper. The relevant points for purposes of this paper are: (1) that interrogation is one of the main rationales for preventive detention as a tool in the war on terror; (2) that there is evidence (discussed below) that all three kinds of methods work to some degree; and (3) that more research and study needs to occur in order to determine interrogation’s overall effectiveness. In other words, this paper does not discuss whether certain interrogation tactics are lawful or unlawful but instead focuses on the efficacy and costs to interrogation in general and ponders whether interrogation in general can be a legitimate rationale for preventive detention.

B. IS INTERROGATION A LEGITIMATE RATIONALE FOR PREVENTIVE DETENTION?

As the concept of preventive detention as a tool in the war on terror is based on the underlying rationales for preventive detention, such as interrogation, it is necessary to assess whether, and under what circumstances, interrogation of suspected terrorists

¹⁷¹ A 1994 statute passed by Congress prevents “severe” physical pain and “prolonged mental harm.” See *Definitions*, U.S. Code 18 (1994), § 2340. Which tactics rise to this level are beyond the scope of this thesis.

¹⁷² Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 174.

actually produces actionable intelligence. In September 2006, President Bush stated: “Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway. This intelligence -- this is intelligence that cannot be found any other place. And our security depends on getting this kind of information.”¹⁷³ Yoo states that “intelligence gathered from captured al Qaeda and Taliban fighters allowed our intelligence, military, and law enforcement to frustrate plots that could have killed thousands of Americans.”¹⁷⁴ He explains in his book *War by Other Means* the capture and subsequent interrogations of Abu Zubaydah (al Qaeda’s chief military planner) and Ramzi bin al Shibh lead to the capture of KSM who has been described as the “principal architect” behind 9/11 attacks.¹⁷⁵ Yoo describes how interrogations of these men “revealed not only how 9/11 was carried out, but the entire command structure of al Qaeda, its processes and organization, and how operations are planned, approved, and executed.”¹⁷⁶ According to U.S. intelligence officials, Zubayda’s information led to the apprehension of other al Qaeda members, including Ramzi Binalshibh, Omar Faruq, Rahim al-Nashiri, and Muhammad al-Darbi.¹⁷⁷ John Kiriakou, a retired CIA agent, noted that after thirty-five seconds of waterboarding, Zubaydah provided “threat information” that “disrupted a number of attacks, maybe dozens of attacks.”¹⁷⁸

¹⁷³ George W. Bush, President of the U.S., *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, (Washington, DC: White House, September 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (accessed June 18, 2008).

¹⁷⁴ Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 45.

¹⁷⁵ *Ibid.*, 167.

¹⁷⁶ *Ibid.*, 190.

¹⁷⁷ Dana Priest, “CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review,” *Washington Post*, June 27, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html> (accessed June 26, 2008).

¹⁷⁸ Richard Esposito and Brian Ross, “Coming in From the Cold: CIA Spy Calls Waterboarding Necessary but Torture,” *ABCNEWS*, December 10, 2007, <http://abcnews.go.com/Blotter/Story?id=3978231andpage=1> (accessed June 26, 2008).

In fact, Zubaydah specifically named Padilla and provided information on where to locate him in Pakistan.¹⁷⁹ Padilla was then followed to America where FBI agents arrested him at O'Hare airport. Former Deputy Attorney General Comey describes how Zubaydah, Ramzi bin al Shibh, and KSM played an instrumental role in training and preparing Padilla for his mission to detonate a radioactive bomb in America.¹⁸⁰ Yet, after spending three and one-half years as an enemy combatant, Padilla was ultimately never charged with attempting to detonate a radioactive bomb, presumably because the government did not have adequate evidence that could be brought in an Article III court or because it did not wish to reveal sources and methods.¹⁸¹ Some legal analysts suggest that prosecutors decided to forgo charges on the dirty bomb plot because it would have opened the door for courtroom scrutiny of the government's use of coercive interrogations against al Qaeda operatives, including Padilla.¹⁸² Therefore, it is difficult to assess whether the interrogations of Zubaydah, Ramzi bin al Shibh, and KSM – which are understandably classified – provided accurate and reliable information about Padilla's plans to detonate a radioactive bomb. Yet, Padilla was convicted of various terrorism-related charges in August 2007, and his capture occurred because of interrogation of captured al Qaeda operatives.

One obvious question – given that Padilla was locked up as an enemy combatant for three and one-half years – is whether the U.S. government actually obtained actionable intelligence from Padilla to plausibly justify its treatment of him. The Bush Administration has certainly asserted it has obtained useful intelligence. In May 2004, Comey stated that “[w]e now know much of what Jose Padilla knows. And what we have learned confirms that the president of the United States made the right call.”¹⁸³ Officials announced that after two years of interrogation, Padilla had confessed to involvement in the dirty bomb plot, although he insisted he never planned to carry it to

¹⁷⁹ Suskind, *The One Percent Doctrine*, 117.

¹⁸⁰ Deputy Attorney General James Comey, remarks concerning Jose Padilla.

¹⁸¹ Mukasey, “Jose Padilla Makes Bad Law.”

¹⁸² Richey, “Beyond Padilla Terror Case, Huge Legal Issues.”

¹⁸³ *Ibid.*

fruition and had only made the proposal to al Qaeda leaders in 2002 as a way to justify fleeing Pakistan to avoid being sent to fight U.S. forces in Afghanistan.¹⁸⁴ According to officials, Padilla also provided information about an alleged plot to blow up an apartment building by leaving gas stoves on and admitted to having contact with senior al Qaeda operatives.¹⁸⁵ Of course, as explained above, such assertions have never been litigated in a court of law, as Padilla was never charged with planning any specific terrorist plot but rather with a broad conspiracy charge that he was a willing participant in a global terror campaign to wage violent jihad by murdering and maiming people. Investigative journalist Tim Golden notes that “it is not clear that the information that Padilla has provided since being held as an enemy combatant has been vital.”¹⁸⁶

There is stronger evidence that interrogations of KSM and other high level al Qaeda operatives have produced actionable intelligence that has thwarted specific terrorist attacks within the U.S. In September 2006, President Bush revealed to the American public specific terrorist plots that had been thwarted by interrogation of key al Qaeda operatives. According to President Bush, interrogation of KSM led to the capture of Hambali, the leader of al Qaeda’s Southeast Asian affiliate known as “J-I” and to a cell of seventeen Southeast Asian “J-I” operatives who were planning on attacking within the United States, possibly using airplanes.¹⁸⁷ In addition, KSM revealed details about al Qaeda’s biological weapons program that led to the capture of two principal assistants who were working on al Qaeda’s anthrax program. Furthermore, according to President Bush, terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti and helped stop a planned attack on the U.S. consulate in Karachi using car bombs and motorcycle bombs.¹⁸⁸ As former CIA head George Tenet noted in his book *At the Center of the Storm: My Years at*

¹⁸⁴ Richey, “Beyond Padilla Terror Case, Huge Legal Issues.”

¹⁸⁵ Ibid.

¹⁸⁶ Center of Law and Security at NYU School of Law, “Prosecuting Terrorism: The Legal Challenge,” 15.

¹⁸⁷ George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*.

¹⁸⁸ Ibid.

the CIA, “I believe none of these successes would have happened if we had to treat KSM like a white-collar criminal--read him his Miranda rights and get him a lawyer who surely would have insisted that his client simply shut up.”¹⁸⁹

According to intelligence documents published by *Newsweek*, the federal authorities were able to uncover at least one KSM-run cell that could “have done grave damage to the United States.”¹⁹⁰ Furthermore, al Qaeda plotters were “scheming to take down the Brooklyn Bridge, destroy an airliner, derail a train and blow up a whole series of gas stations.”¹⁹¹ Specifically, interrogations of KSM resulted in the arrest of Majid Khan, a former Baltimore resident who had been tasked with simultaneously detonating explosives in several gas stations’ underground storage tanks. KSM also revealed that he wanted commercial truck driver Iyman Faris, a naturalized U.S. citizen and resident of Columbus, Ohio (and a relative of Khan) – to destroy the Brooklyn Bridge by cutting its suspension wires. KSM further identified Adnan el Shukri Jumah, a Saudi born permanent U.S. resident alien who received an associate’s degree from a Florida college, as an operative with standing permission to attack targets in the United States that have been approved by bin Laden. Most significant is that KSM identified Ali al-Marri as “the point of contact for AQ operatives arriving in the U.S. for September 11 follow-on operations.” KSM described al-Marri as “the perfect sleeper agent because he has studied in the United States, had no criminal record, and had a family with whom he could travel.”¹⁹² Al-Marri was arrested in Peoria and labeled as an enemy combatant in 2003. He allegedly had trained with KSM and Bin Laden and had researched weapons of mass destruction on his laptop. As explained previously, his case is currently pending an evidentiary hearing. Hence, there appears to be evidence that interrogations of al Qaeda operatives have produced critical intelligence that has stopped attacks and led to arrests of other al Qaeda operatives.

¹⁸⁹ George Tenet, *At the Center of the Storm: My Years at the CIA* (New York: HarperCollins Publishers, 2007), 255.

¹⁹⁰ Evan Thomas, “Al Qaeda in American: The Enemy Within,” *Newsweek*, October 23, 2007, <http://www.newsweek.com/id/59672/output/print> (accessed March 30, 2008).

¹⁹¹ Ibid.

¹⁹² Ibid.

Furthermore, there is evidence from other countries that interrogation has produced actionable intelligence that has stopped specific terrorist attacks. A 1995 plot by al Qaeda to bomb eleven American airlines was thwarted by information tortured out of a Pakistani suspect by the Philippine police.¹⁹³ Furthermore, evidence from Israel suggests that coercive interrogation is effective and saves lives. The Landau Commission found that “effective activity by the [General Security Service, or GSS] to thwart terrorist acts is impossible without the use of the tool of the [coercive] interrogation of suspects, in order to extract from them vital information known only to them, and unobtainable by other means.”¹⁹⁴ In a report submitted to the United Nations, Israel stated that GSS investigations thwarted ninety planned terrorist attacks, including “10 suicide bombings; 7 car-bombings; 15 kidnappings of soldiers and civilians; and some 60 attacks of different types”¹⁹⁵ While the Israeli Supreme Court ruled that the GSS practices of coercive interrogation required clear legislative authorization and violated rights of human dignity, it did acknowledge that coercive interrogation works.¹⁹⁶ Law Professor Sanford Levison explains how “torture enabled the French to gather information about future terrorist strikes and to destroy the infrastructure of terror in Algiers.”¹⁹⁷

Another example of successful interrogation was FBI agent George Piro’s in-depth seven-month interrogation of Saddam Hussein. While Piro did not use coercive interrogation but rather relied on creating a “relationship of dependency, trust, and emotion,” Piro believes his success can largely be attributed to the length of time he had

¹⁹³ Luban, “The War on Terrorism and The End of Human Rights,” 227.

¹⁹⁴ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 196.

¹⁹⁵ Sanford Levison, “Precommitment and Postcommitment: the Ban on Torture in the Wake of September 11,” *Texas Law Review*, 81 (June 2003): 2029.

¹⁹⁶ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 196.

¹⁹⁷ Levison, “Precommitment and Postcommitment: the Ban on Torture in the Wake of September 11,” 2029-2030.

to create the relationship.¹⁹⁸ Based on Piro's interrogation, Hussein revealed his reasons for invading Kuwait and more importantly his rationale for creating the perception that he had weapons of mass destruction.¹⁹⁹

Along similar lines, the Department of Defense (DoD) Criminal Investigation Task Force (CITF), using exclusively non-coercive interrogation methods, conducted over 10,000 interviews of detainees and obtained evidence and confessions that linked subjects to the 9/11 attacks, the *USS Cole* bombing, al Qaeda recruiting, training and financing, and other acts.²⁰⁰ According to former Colonel Britt Mallow, who was the Commander in charge of the DoD-wide effort to investigate terrorism and war crimes cases for prosecution by the Military Commissions, a significant portion of the detainees held at Guantanamo Bay between 2002-2005 incriminated themselves and implicated others during non-coercive interrogation.²⁰¹ According to Colonel Mallow, information obtained from the detainees was largely corroborated by physical or documentary evidence or intelligence reports.²⁰² The significance of these examples is that, even when non-coercive interrogation methods are employed, interrogation can produce useful information. Such examples support the efficacy of interrogation as a rationale for preventive detention. In sum, although largely anecdotal, there are countless examples of interrogation providing actionable intelligence.

Despite the evidence discussed above about the effectiveness of interrogation, many lawyers as well as military, law enforcement, and intelligence professionals argue that coercive interrogation produces only unreliable information or that it is not worth the ensuing costs to America's reputation and human dignity. For instance, although it appears as explained above that KSM provided actionable intelligence information, there

¹⁹⁸ Henry Schuster, "Interrogator Shares Saddam's Confessions," *60 Minutes*, January 27, 2008, <http://www.cbsnews.com/stories/2008/01/24/60minutes/main3749494.shtml> (accessed February 2, 2008).

¹⁹⁹ Ibid.

²⁰⁰ Britt Mallow (former Colonel of Criminal Investigation Task Force, DOD), interview by author, Washington, D.C., May 5, 2008.

²⁰¹ Ibid. The non-coercive methods included deception and other measures that law enforcement typically employ within the U.S.

²⁰² Ibid.

is nonetheless the question of how much useless, unreliable or inaccurate information was also obtained, and whether acting on any of that information could, or actually did, endanger U.S. people or interests. There are reports that KSM confessed to a number of things in which he had no direct involvement.²⁰³ Shafiq Rasul, the named plaintiff in *Rasul v. Bush*, falsely confessed to attending an al Qaeda training camp in Afghanistan when evidence showed that he was at home in England at the time.²⁰⁴ Consequently, some military lawyers believe that “the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.”²⁰⁵ A senior Pentagon intelligence officer has expressed concerns that intelligence gathered from coercion could be inaccurate or false, and that isolation as an interrogation tactic could negatively impact the source to recall information.²⁰⁶ Law Professor Brian Foley notes that “[m]ost people who are ‘water-boarded,’ beaten, deprived of sleep, and attacked by guard dogs – or who are simply threatened with such treatment – will, at some point, decide that it is in their interest to acquiesce to their captors, such as by telling them what they know, agreeing with the accusations interrogators makes against them, or even concocting stories that they believe will please their interrogators.”²⁰⁷ Suskind notes in his book *The One Percent Doctrine* that al Qaeda operative Zubaydah (discussed above as providing actionable intelligence) may actually have been a mentally ill low-level logistics person who did provide useful information to the Administration.²⁰⁸ According to Suskind, FBI agents have even questioned the effectiveness of coercive interrogation. As one FBI agent stated: “The CIA wants everything in five minutes. It’s not possible and it’s not productive. What you get in that circumstance is captives and captors playing into each

²⁰³ Brian Foley, “Guantanamo and Beyond: Dangers of Rigging the Rules,” *Journal of Criminal Law and Criminology*, 97, 1009 (Summer 2007): 1046.

²⁰⁴ Ibid.

²⁰⁵ Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 189, citing the U.S. Army Interrogation Field Manual 34-52, at 1-1 (May 8, 1987).

²⁰⁶ Josh White, “Interrogation Research is Lacking,” *Washington Post*, January 16, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011501204.html> (accessed October 11, 2007).

²⁰⁷ Foley, “Guantanamo and Beyond: Dangers of Rigging the Rules,” 1044-45.

²⁰⁸ Suskind, *The One Percent Doctrine*, 95-100.

other's expectations, playing roles – essentially – that gives you a lot of garbage information and nothing you can use.”²⁰⁹ Even Yoo – a proponent of the enemy combatant policy – acknowledges that “coercive interrogation” should not be used in every case and that it does not always work. Nonetheless, he maintains that it should not be ruled out across the board.²¹⁰

One way to assess the validity of the Administration's assertions that interrogations of al Qaeda operatives have produced useful intelligence would be the *Detainee Interrogation Reports* mentioned and relied on by the authors of the bi-partisan *9/11 Commission Report*. According to the commissioners, while they were allowed to submit questions to the interrogators of the detainees, they had no control over whether, when or how the questions would be asked.²¹¹ Significantly, the commissioners noted that they used corroborating evidence as much as they could to assess the accuracy of the information but that “[a]ssessing the truth of statements by these witnesses – sworn enemies of the United States – is challenging.”²¹²

While it convenient to argue that coercive interrogation does not work – and therefore cannot under any circumstances be a rationale for preventive detention – the reality, as discussed above, is much more complicated than such an absolutist position might suggest. Law professors Vermuele and Posner argue that asserting that coercive interrogation does not work is a convenient delusion:

Perhaps, all of the officials and actors who use coercive interrogation to extract information on preventive grounds are acting immorally or imprudently, but to claim that coercive interrogation is entirely ineffective is to claim that those actors, all of them, are acting irrationally. . . . The claim that coercive interrogation is ineffective is a delusion, although it may be a morally pleasing one. It is either a form of wishful thinking or dissonance reduction that allows people to avoid conflict between their

²⁰⁹ Suskind, *The One Percent Doctrine*, 114.

²¹⁰ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 192.

²¹¹ *The 9/11 Commission Report*, 146.

²¹² *Ibid.*

moral commitments and their prudential commitments, or a rhetorical turn that opponents of coercive interrogation use to advance their moral agenda.²¹³

Judge Posner argues that “[q]uite apart from the abundant evidence that torture *is* often an effective method of eliciting true information, which is also the common sense of the situation, methods of coercive interrogation well short of torture but more coercive than is permissible for eliciting statements used in an ordinary criminal proceeding are often effective too.”²¹⁴ Hence, prominent scholars who have studied the issue have validated the efficacy of coercive interrogation as a way to obtain valuable information.

Other scholars argue that the issue of whether coercive interrogation works is simply unknown. As Law Professor Levison describes:

One problem is that we really have no idea how reliable torture is as a method of procuring information. To put it mildly, there are no methodologically sophisticated tests of its effectiveness. Indeed, one cannot even imagine their occurring in anything but a totalitarian political regime, for who would ever give an “informed consent” to being tortured as part of the experiment? One is therefore left to anecdote and counter-anecdote with regard to the efficacy or futility of torture.²¹⁵

Nonetheless, there does appear to be some hope of being able to evaluate the effectiveness of coercive interrogation with future study. A December 2006 Intelligence Science Board (ISB) 374-page report examined several aspects of interrogation methods. As journalist Josh White summarizes, the ISB report concluded that “popular culture” and “ad hoc experimentation” have “fueled the use of aggressive and sometimes physical interrogation techniques to get those captured . . . to talk, even if there is no evidence to support the tactics’ effectiveness.”²¹⁶ The ISB noted that no significant scientific research has been conducted in more than four decades about the effectiveness of many

²¹³ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 195.

²¹⁴ Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 81. (Emphasis in original).

²¹⁵ Levison, “Precommitment and Postcommitment: the Ban on Torture in the Wake of September 11,” 2029.

²¹⁶ White, “Interrogation Research is Lacking.”

interrogation techniques that are regularly used by the military and intelligence groups.²¹⁷ Robert Fein, chairman of the study, observed: “This shortfall in advanced, research-based interrogation methods at a time of intense pressure from operational commanders to produce actionable intelligence from high-value targets may have contributed significantly to the unfortunate cases of abuse that have recently come to light.”²¹⁸ The ISB recommended additional scientific research of interrogation methods (both retrospective analyses of data about past interrogations and new studies that relate different practices to the value of the information obtained) to determine what is effective.²¹⁹

The more pressing and relevant question is, assuming interrogation works in certain circumstances and with certain individuals, should individuals be locked up indefinitely without counsel for the purposes of interrogation to obtain actionable intelligence? Should the executive branch be allowed to unilaterally determine which terrorist suspects are ripe for prolonged and incommunicado interrogation? As Law Professor Foley notes, “[t]he Executive . . . is not all-knowing and never has been.”²²⁰ In fact, a German national named Khaled el-Masri was arrested by Macedonian officials, transferred to the CIA for coercive interrogation in Afghanistan, and then released five months later in Albania after then National Security Advisor Condoleezza Rice admitted that he had been mistakenly identified as a terrorism suspect.²²¹ As explained in Chapter II, given that terrorist suspects are often detained in peaceful civilian areas and not on an actual battlefield, mistakes have been made and will continue to be made in this war on terror.

²¹⁷ Fein, “Introduction, Intelligence Science Board Study on Educating Information,” 6.

²¹⁸ Robert Fein, “Prologue, U.S. Experience and Research in Educating Information: A Brief History,” in *Educating Information*, xiii.

²¹⁹ Fein, “Introduction, Intelligence Science Board Study on Educating Information,” 6.

²²⁰ Foley, “Guantanamo and Beyond: Dangers of Rigging the Rules,” 1017.

²²¹ Neil A. Lewis, “Man Mistakenly Abducted by CIA Seeks Reinstatement of Suit,” *N.Y. Times*, A15, November 29, 2006, <http://www.nytimes.com/2006/11/29/washington/29rendition.html?fta=y> (accessed June 18, 2008).

Furthermore, there are consequences to coercive interrogation. Al-Marri's attorneys assert that his six and one-half years of detention with no charges (five of them as an enemy combatant) have degraded his mental state and left him unable to participate in his defense.²²² Similarly, mental health experts who have examined Padilla say the coercive techniques, which allegedly included sleep and sensory deprivation as well as disorienting drugs, shackles, and stress positions, have left him with severe psychological damage that may be permanent.²²³ Although the Administration contends that Padilla is faking his psychological condition, there is nonetheless a concern to American's reputation and credibility with respect to its interrogation methods.²²⁴ Army Col. Stuart Herrington, a military intelligence specialist who conducted interrogations in Vietnam, argues that coercive interrogation "endangers our soldiers on the battlefield by encouraging reciprocity," causes "damage to our country's image" and "undermines our credibility."²²⁵

By contrast, Vermuele and Posner argue that coercive interrogation will only have a "marginal" negative effect on the United States' reputation because the U.S. is "already heavily criticized for policies that will not change anytime soon – capital punishment, ungenerous social welfare policies, aggressive use of its military, [and] reluctance to cooperate in international organizations."²²⁶ They also argue that liberal democracies that "collapse into chaos" because they are "bullied by authoritarian regimes or terrorist organizations are not attractive role models." Yoo concludes that information obtained from coercive interrogation has saved thousands of Americans and was worth the costs to

²²² Josh White, "Lawyers Fear for Marri's Sanity," *The Washington Post*, A 02, June 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/03/AR2008060303062.html> (accessed June 26, 2008).

²²³ Richardson, "Is This Man a Monster?" 128; Warren Richey, "In Padilla Interrogation, No Checks or Balances," *Christian Science Monitor*, September 4, 2007, <http://www.csmonitor.com/2007/0904/p02s01-usju.htm> (accessed June 26, 2008).

²²⁴ Warren Richey, "U.S. Gov't Broke Padilla through Intense Isolation," *Christian Science Monitor*, August 14, 2007, <http://www.csmonitor.com/2007/0814/p11s01-usju.html> (accessed June 26, 2008).

²²⁵ Anne Applebaum, "The Torture Myth," *Washington Post*, January 12, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A2302-2005Jan11.html> (accessed June 26, 2008).

²²⁶ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 206.

America's reputation.²²⁷ As he explains, al Qaeda clearly sought weapons of mass destruction and ponders: "What President would put America's image in the United Nations above the protection of thousands of innocent civilian lives."²²⁸ Yoo also notes that Israel, Great Britain, and France have employed coercive interrogation in certain circumstances without allow the practice to infect "garden-variety" crimes.²²⁹

A related question is whether the use of questionable interrogation methods limits one's options for ultimate legal or diplomatic disposition of an individual subject. For instance, in 2008, the military dropped charges against Mohamed Al Kahtani, an alleged September 11 conspirator who did not participate in the 9/11 attacks because he was denied entry in the United States. Because of his brutal interrogation, however, the military may not be able to prosecute him. As journalist Wittes notes, the Administration may "have to set him free absent some extrinsic non-criminal detention authority" despite his intent to kill large numbers of Americans.²³⁰ Hence, coercive interrogation – assuming it works – has serious consequences.

While it appears that interrogation of detainees has produced actionable intelligence, it is a more difficult question to assess whether prolonged interrogation as an enemy combatant was the *only* way to obtain such needed intelligence. There is certainly evidence that making deals with terrorists and obtaining their cooperation has also produced actionable intelligence. Former Attorney General Ashcroft informed Congress in 2007 that the Justice Department had obtained criminal plea agreements – "many under seal" – with more than fifteen individuals who were cooperating with federal authorities, leading to "critical intelligence" about al Qaeda safe houses and recruiting tactics.²³¹ For instance, Faras – the individual who was tasked by KSM to destroy the

²²⁷ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 44-45.

²²⁸ *Ibid.*, 45.

²²⁹ *Ibid.*, 193.

²³⁰ Benjamin Wittes, "Improving Detainee Policy: Handling Terrorist Detainees within the American Justice System," *Brookings* (June 2008), http://www.brookings.edu/testimony/2008/0604_detainees_wittesb.aspx (accessed June 26, 2008).

²³¹ Thomas, "Al Qaeda in American: The Enemy Within."

Brooklyn Bridge – entered a plea agreement and is now cooperating with authorities.²³² Furthermore, in December 2001, authorities in Britain captured Sajid Badat, a 22-year old Muslim born in Gloucester who had returned to Britain after completing al Qaeda training in Afghanistan and Pakistan.²³³ His mission – along with Richard Reid who was thwarted by passengers and crew on-board an airplane – was to blow up an aircraft traveling from Britain to the United States. He abandoned the plot and is cooperating with British authorities. Journalist Michael Jacobson notes that “the reasons for a change of heart can be strikingly prosaic: family, money, petty grievances. But they also can revolve around shaken ideology or lost faith in a group’s leadership.”²³⁴ Hence, there is evidence that obtaining intelligence from actual terrorists does not have to be through prolonged isolation or labeling them as enemy combatants.

Nonetheless, there is no reason that America needs only one, exclusive approach to gathering intelligence. While offering incentives and rewards may coax some terrorists into cooperating, other terrorists, such as KSM or al-Marri, may need to be subjected to prolonged interrogation. According to former Attorney General Ashcroft, one of the reasons al-Marri was labeled an enemy combatant was that he “rejected numerous offers to improve his lot by cooperating with the FBI investigators and providing information.”²³⁵ At a minimum, one can certainly acknowledge that “the value of detainees as a source of information remains high in a substantial part of the intelligence community.”²³⁶ Perhaps, opponents of coercive interrogation would be more comfortable with interrogation as a rationale for preventive detention if only non-coercive methods, such as the methods used on Saddam Hussein were employed. In

²³² Center of Law and Security at NYU School of Law, “Prosecuting Terrorism: The Legal Challenge,” 20.

²³³ Michael Jacobson, “They Trained. They Plotted. They Bailed,” *Washington Post*, March 23, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/21/AR2008032102745.html> (accessed March 30, 2008).

²³⁴ *Ibid.*

²³⁵ John Ashcroft, *Never Again: Securing America and Restoring Justice* (New York: Hachette Book Group, 2006), 168-69.

²³⁶ Patricia Wald, “The Supreme Court Goes to War,” *Terrorism, The Laws of War and the Constitution*, ed. Peter Berkowitz (Stanford, CA: Hoover Institution Press, 2005), 51.

other words, while this paper does not address whether any particular interrogation tactic is lawful or coercive, the question of whether a system of preventive detention can be based on the rationale of interrogation may be dependent on a consensus on the methods used to extract information.

While there appear to be compelling reasons for interrogation as a rationale for preventive detention, especially where non-coercive methods are used, that ultimate conclusion will depend on threat level as discussed in Chapter II and additional discussion and study on the issue. Therefore, at this juncture, this author does not definitively conclude that interrogation is a legitimate rationale for preventive detention in all circumstances. Assuming it is a viable justification – and there certainly is evidence that supports such a position – and assuming the threat level merits it, this paper proposes creating a preventive detention regime for purposes of interrogation that has more due process rights for the detainee than the current enemy combatant policy.

C. INCAPACITATION

A second reason for preventive detention and President Bush's enemy combatant policy is incapacitation. As discussed in Chapter II, the battlefield in this war on terror is no longer an actual zone of combat but includes otherwise peaceful civilian areas. Incapacitation as a rationale for preventive detention is obviously more compelling if the terrorist suspect is detained by military personnel on an actual battlefield during hostilities, such as Hamdi, but loses some persuasiveness when the terrorist suspect is detained by the FBI in an American city that is not involved in a battle, such as Padilla and al-Marri. An argument can be made, however, that terrorists, if not incapacitated when caught in a civilian area, may then leave for a zone of combat in Afghanistan or Iraq, or commit terrorist attacks in civilian areas. Critics respond that the criminal justice system can incapacitate terrorist suspects caught in a peaceful civilian area by the filing of criminal charges – not by labeling them as enemy combatants when they are not captured in a zone of combat. While it would be impractical to require “soldiers in the field to worry about warrants, lawyers, Miranda, forensic evidence, and chains of custody

if we want to win the war on terrorism,”²³⁷ such an argument cannot honestly apply to the situations of Padilla and al-Marri, who were detained in the U.S. by the FBI (not soldiers) and not on an actual battlefield.

During the oral argument in *Hamdi*, Deputy Solicitor General Clement argued that incapacitation of Hamdi was a legitimate rationale for designating him an enemy combatant. Clement posited that the Administration needed to detain Hamdi so he would not rejoin the battlefield while the United States had 10,000 American troops in Afghanistan.²³⁸ According to an affidavit from a Defense Department official (i.e., the Mobbs declaration), Hamdi surrendered to the Northern Alliance who turned him over to U.S. authorities. Thus, the Mobbs declaration is based on hearsay from a Northern Alliance official who informed the United States that Hamdi was fighting for the Taliban in Afghanistan with an assault rifle.²³⁹ Significantly, Hamdi was never allowed to challenge the facts presented in this affidavit. According to his father, Hamdi was in Afghanistan on a humanitarian mission.

Justice O’Connor, in her plurality opinion in *Hamdi*, explicitly ***upheld incapacitation*** as a justification for preventive detention as long as the individual was held only for the duration of hostilities and allowed an opportunity to challenge the designation as an enemy combatant: “Because detention to prevent combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”²⁴⁰ Significantly, after this ruling, the Administration did not provide Hamdi a meaningful opportunity to challenge his designation as an enemy combatant or the underlying facts asserted in the Mobbs declaration. Rather, in October 2004, the government released Hamdi to Saudi Arabia

²³⁷ Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 157.

²³⁸ Ball, *Bush, the Detainees and the Constitution*, 109.

²³⁹ *Hamdi*, 542 U.S. at 507.

²⁴⁰ *Ibid.*, 519.

after it determined that he no longer posed a threat to the United States, thereby undermining – to some extent – the Administration’s rationale for detaining this dangerous individual.²⁴¹

Nonetheless, there is evidence to suggest that al Qaeda detainees who have been released have returned to the battlefield.²⁴² In April 2008, a Kuwaiti man released from Guantanamo Bay in 2005 blew himself up in a suicide bombing in Iraq killing six people.²⁴³ The Bush Administration states that as many as twelve people released from Guantanamo have returned to the battlefield to fight again against U.S. interests.²⁴⁴

Although the Supreme Court has upheld the rationale of incapacitation of a terrorist suspect caught in an active zone of combat (e.g., Hamdi), it has not addressed whether incapacitation of terrorist suspects caught by the FBI in an American city is justified (e.g., Padilla and al-Marri). (This topic will be addressed in detail in Chapter IV.) Certainly, in some cases, the filing of criminal charges is one uncontroversial way to incapacitate terrorist suspects caught in a civilian area. Yet, advocates of preventive detention argue that there may not be sufficient admissible evidence to detain a terrorist suspect under the traditional criminal justice system. For instance, a foreign government may provide intelligence about an individual but refuse to provide any admissible evidence, the evidence may have been obtained by unsavory means and therefore inadmissible, or the evidence could compromise sources and methods. Michael Chertoff, former federal appellate judge (now Secretary of Homeland Security), asked a chilling question at an ABA Standing Committee on Law and National Security meeting in 2004. He assumed it was September 10, 2001 and FBI agents just received word from a reliable and confidential source that members of an international terrorist organization were planning to hijack commercial airliners and bomb New York and Washington, D.C.

²⁴¹ Isikoff and Hosenball, “Out of the Brig: ‘Enemy Combatant’ Yaser Hamdi Will Soon be Released from a Military Prison without Facing Any Charges.”

²⁴² Wedgewood, “The Supreme Court and The Guantanamo Controversy,” 176.

²⁴³ Mike Mount, “Pentagon: Ex-Detainees Returning to Fight,” *CNN*, May 7, 2008, <http://www.cnn.com/2008/WORLD/meast/05/07/gitmo.bomber/> (accessed June 26, 2008).

²⁴⁴ Jackie Northam, “Q and A about Guantanamo Bay and the Detainees,” *National Public Radio*, June 23, 2005, <http://www.npr.org/templates/story/story.php?storyId=4715916> (accessed June 26, 2008).

Chertoff pondered what the FBI could legally do.²⁴⁵ While FBI agents could arrest the members to disrupt their plans, it would be hard to hold them on specific charges based on the confidential nature of the sources and the hearsay nature of the evidence. It would seem, at a minimum, that these individuals should be arrested and incapacitated at least for a short time to disrupt their plans. Such incapacitation, however, would negate the idea of innocent until proven guilty. Chertoff suggested that America needed changes to its current legal system that balance these real security threats with civil liberties.²⁴⁶ According to Former Deputy Attorney General George Terwilliger, “the use of criminal prosecutions to incapacitate terrorists is proving to be clumsy, inadequate and, civil libertarians should note, taking law enforcement powers where they have never gone before.”²⁴⁷ Thus, it appears that one rationale for preventive detention is interruption of plans, even if specific criminal charges cannot be made within forty-eight hours of arrest, as is the usual requirement under the Fourth Amendment of the Constitution.²⁴⁸

Judge Posner also suggests that the government may have a compelling reason to detain a terrorist suspect more than the standard forty-eight hours: “namely, to avoid tipping off his accomplices that the government has seized him, while meanwhile extracting from him information that it can use to arrest them before their suspicions are aroused, or even to ‘turn him’ so that he becomes a double agent, spying on his erstwhile accomplices.”²⁴⁹ Incapacitation because there is not enough evidence to charge a terrorist suspect, or for the extraction of information about accomplices, however, are not foolproof arguments. There are presently several federal statutes that criminalize inchoate crimes such as conspiracy, attempt, and providing material support to terrorists. According to former federal prosecutor Kenneth Roth, U.S. courts are fully capable of addressing today’s terrorist threat and can use conspiracy law, which only requires two or

²⁴⁵ Thomas Lyons, “Judge Chertoff Addresses Challenges to the Legal System in Fighting Terrorism,” *American Bar Association National Security Law Report*, 26, no. 3 (October 2004): 6, http://www.abanet.org/natsecurity/nslr.shtml#volume_26 (accessed September 7, 2007).

²⁴⁶ Ibid.

²⁴⁷ Terwilliger, “‘Domestic Unlawful Combatants’: A Proposal to Adjudicate Constitutional Detentions,” 58.

²⁴⁸ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

²⁴⁹ Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, 62-63.

more people to agree to pursue an illegal plan and take at least one step to advance it, as a way to incapacitate most terrorists. Similarly, he argues that the crime of providing material support to terrorists can occur even when a terrorist act is only in preparation and has not yet been committed.²⁵⁰ Hence, it is unclear under Chertoff's example why such men could not be arrested and charged with conspiracy, attempt, or providing material support to terrorists. Furthermore, the government could charge terrorism defendants with violations of "alternative statutes" such as immigration violations, false statements or credit card fraud.²⁵¹ In fact, credit card fraud is what the government charged al-Marri with in 2002 before switching course and designating him an enemy combatant in 2003.

The criminal justice system also has procedures in place to protect confidential sources, who can supply probable cause for an arrest or search warrant, which is the typical procedure in drug cases. It also should be noted that probable cause, not proof beyond a reasonable doubt, is required to arrest someone. Furthermore, the Bail Reform Act of 1984 provides a mechanism to detain a suspect before trial based on a showing of dangerousness and risk of flight. In fact, in 2000, the Second Circuit upheld pretrial detention of 30- 33 months of a suspected terrorist with alleged links to al Qaeda based on "a substantial threat to national security."²⁵² Alternatively, the FBI could put such terrorist suspects under surveillance to gather more evidence and/or to capture more accomplices. In all fairness, however, surveillance, without knowing the suspect's intent has its limits; it would not have been productive to watch Mohammad Atta board a plane with FBI agents waiting to continue surveillance after he disembarked in Los Angeles.

As with interrogation, incapacitation seems to be a plausible rationale for preventive detention. It certainly has its weaknesses, however, and if employed as a rationale to sustain a system of preventive detention, we need a better understanding of why the current criminal justice system is so inadequate to incapacitate terrorist suspects caught in civilian areas as opposed to an actual zone of conflict.

²⁵⁰ Roth, "After Guantanamo, The Case Against Preventive Detention."

²⁵¹ Zabel and Benjamin, "In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts," 6.

²⁵² *United States v. El-Hage*, 213 F. 3d 74, 80 (2d Cir. 2000).

D. DIFFICULTIES WITH TRYING SUSPECTS IN ARTICLE III COURTS

A third plausible justification for preventive detention could be difficulties with trying terrorist suspects in Article III courts. While this justification is related to incapacitation due to a supposed lack of evidence to arrest, this rationale is more concerned with protecting intelligence sources during a trial and with the difficulties of applying the rules of evidence in wartime environments. In other words, the rationale articulated in this section is based less on the lack of evidence than on how and where that evidence is going to be presented. As will be explained, this is the weakest of plausible reasons for preventive detention because these issues, while illustrating genuine challenges to terrorism prosecutions, are really addressing a *separate* problem of where and how terrorist suspects should be tried – not whether they should be held incommunicado as a form of preventive detention before trial.

Tasia Scolinos, a Justice Department spokeswoman, explained in November 2005 that the designation of someone as an enemy combatant was not arbitrary and depended on several factors including “national security interests, the need to gather intelligence and the best and quickest way to obtain it, the concern about protecting intelligence sources and methods and ongoing information gathering, the ability to use information as evidence in a criminal proceeding, the circumstances of the manner in which the individual was detained, the applicable criminal charges, and classified-evidence issues.”²⁵³ Included in these multiple justifications for the enemy combatant policy is protecting intelligence sources and using such information in a criminal proceeding.

Evidence establishing individuals as “terrorists” may not be able to be produced in a federal court without disclosing clandestine intelligence assets. Turner and Schulhofer have addressed these questions in an article entitled: *The Secrecy Problems in Terrorism Trials*.²⁵⁴ They explain various scenarios that would make it difficult to try

²⁵³ Liptak, “In Terror Cases, Administration Sets Its Own Rules.”

²⁵⁴ Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*, 3-4.

terrorist suspects in federal courts.²⁵⁵ They dub these examples “the well-placed informant,” and “the recalcitrant ally.”²⁵⁶ The “well-placed informant” represents situations where the evidence comes from an ongoing wiretap or current human informant. By disclosing where the evidence originated, the future intelligence-gathering by that human informant or ongoing wiretap is compromised.

The “recalcitrant ally” represents situations where foreign law enforcement may be willing to share evidence for intelligence-gathering but not for prosecution. Alternatively, a foreign government may elicit a confession from a suspect (without torture) but not be willing to have its interrogator identified or subjected to cross-examination at a suppression hearing.²⁵⁷ Because there is no subpoena power over foreign witnesses, prosecutors might not be able to use valuable and reliable evidence from another country. Intelligence information may also not meet the legal requirements of admissibility, especially if the information is in the form of hearsay, consists of stolen documents, or is photographs taken by foreign agents.²⁵⁸ Other concerns with trying terrorist suspects in federal court include suspects obtaining access to classified or sensitive material, leaks of such information to the public, and threats of physical harm to participants in the trial such as jurors, judges, and prosecutors.²⁵⁹

For instance, during the criminal trial of Omar Abdel Rahman, known as the “blind sheik,” for participation in the 1993 World Trade Center bombing, the federal prosecutor turned over to the defense a list of two hundred possible un-indicted coconspirators in compliance with standard criminal discovery procedures. This list, which was discovered during investigation into the African embassy bombings, was

²⁵⁵ Turner and Schulhofer ultimately conclude that most terrorist suspects can, in fact, be tried in federal courts using a variety of statutes already in existence. The “recalcitrant ally” and “well-placed informant” examples are used in the text to illustrate concrete and real challenges posed by terrorism prosecutions, which could justify a regime of preventive detention.

²⁵⁶ Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*, 3-4.

²⁵⁷ A confession elicited by torture would not be admissible in court as it violates substantive due process. *United States v. Yousef*, 327 F.3d 56, 146 (2d Cir. 2003).

²⁵⁸ Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 3.

²⁵⁹ Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*, 135.

delivered to Bin Laden in Sudan within days of its production in court, allowing Bin Laden to see which operatives were compromised and how American intelligence had learned its information.²⁶⁰

Furthermore, opponents of preventive detention – and especially the enemy combatant policy – often tout the government’s prosecution of Moussaoui (the 20th hijacker) in federal court as evidence that terrorism prosecutions in federal court are successful. To stop the analysis there, however, would be misleading. The government experienced many difficulties in prosecuting Moussaoui in federal court using the traditional criminal justice system. Moussaoui wanted access to KSM and other captured al Qaeda leaders as potential exculpatory evidence to explain how he was not involved in the 9/11 plot but rather was preparing for a second wave. The federal trial judge agreed that access to these individuals was necessary for a fair trial, and when the government understandably refused to produce them based on national security concerns, the judge sanctioned the government by precluding the death penalty. The government appealed and the appellate court held that written summaries from the al Qaeda operatives would serve as substitutes for live testimony. Ultimately, Moussaoui pled guilty and “relieved the government of its quandary between protecting national security secrets and prosecution.”²⁶¹ As Yoo explains, “[t]hose who believe the Moussaoui case shows that the criminal justice system can try terrorists have not paid close attention to the proceedings. If Moussaoui had chosen to fight on, as would be standard operating procedure with a competent defense counsel this case would still be on today. Then, in your mind, multiply that by hundreds or thousands of other terrorists.”²⁶²

Whatever the ultimate conclusions about *where* terrorism suspects should be tried, the forum and procedures to try terrorist suspects is a separate, albeit related, issue to whether we need a system of preventive detention as a tool in the war on terror. Yet, because the Bush Administration mentions these difficulties in prosecuting terrorists as

²⁶⁰ Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 212; Mukasey, “Jose Padilla Makes Bad Law.”

²⁶¹ Yoo, *War by Other Means, An Insider’s Account of the War on Terror*, 215.

²⁶² *Ibid.*, 217.

partial justification for the enemy combatant policy, it is listed here as a plausible justification. Furthermore, many of the alternative ideas proposed to the current enemy combatant policy (discussed in Chapter VII) include solutions that encompass difficulties with trying terrorist suspects in federal court. Nonetheless, it seems that the challenges with trying terrorism suspects in federal court really address a host of different issues not directly related to the question of whether the United States needs a system of preventive detention as a tool in the war on terror.

In sum, while a review of the literature illustrates three plausible reasons for preventive detention and the enemy combatant policy, the only rationales that seem justifiable would be interrogation to obtain actionable intelligence and incapacitation to prevent a terrorist suspect from returning to a battlefield. Both of these justifications are problematic to the tenets of a true democracy but may be necessary depending on the threat level and priorities of the American public. With respect to incapacitation, the rationale for preventive detention is stronger in the case of someone like Hamdi where the detainee is arrested by the military in a zone of combat where chain of custody and other evidentiary issues pose challenges. While it is weaker when the detainee is arrested by the FBI in a peaceful civilian area, there could plausibly be a need for preventive detention if the criminal justice system is inadequate to incapacitate because of classified information, insufficient evidence, or other evidentiary issues. Of course, interrogation and incapacitation may support each other and not be mutually exclusive rationales. For instance, it may be necessary to interrogate to determine if the suspect is likely to be dangerous and will return to the battlefield, which supports incapacitation. Given these plausible reasons for preventive detention, the next question discusses whether a system of preventive detention based on these rationales could ever be lawful.

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IV. LAWFULNESS OF PREVENTIVE DETENTION

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, the courts must accord proper deference to the political branches. However, security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.

-Justice Anthony Kennedy in *Boumediene v. Bush*²⁶³

In creating a preventive detention regime in the United States, a preliminary and fundamental question that needs to be addressed is under what circumstances, if any, can it ever be lawful? Wittes and Gitenstein from the Brookings Institution note that “[d]eveloping rules for detaining suspected enemies engaged in unconventional warfare against the United States represents the fundamental challenge facing American legal policy in the war on terrorism today.”²⁶⁴ As this chapter explores, there are both constitutional and statutory concerns with creating a preventive detention regime whereby U.S. persons are detained with no criminal charges and held indefinitely for the purposes of interrogation, incapacitation, or difficulties with trying them in Article III courts. While the Supreme Court has not yet decided whether U.S. persons captured in peaceful civilian areas can be held indefinitely as enemy combatants, it is likely the Supreme Court will ultimately find the enemy combatant policy to be in violation of the Constitution and the Non-Detention Act of 1971,²⁶⁵ which requires Congress to pass a statute before individuals can be detained.

Nonetheless, even should the enemy combatant policy be found unlawful, there does appear a way to create a lawful regime of preventive detention as a tool in the war on terror if: (1) the detainees are allowed to challenge in some way the underlying factual

²⁶³ *Boumediene v. Bush*, No. 06-1195, slip op at 68, 553 U.S. ___, 2008 WL 2369628 (June 12, 2008).

²⁶⁴ Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 7.

²⁶⁵ U.S. Code 18 (1971), § 4001(a).

evidence establishing their need to be preventively detained and (2) Congress enacts legislation explicitly setting forth the conditions and rules for preventive detention.

A. CONSTITUTIONAL CONCERNS WITH PREVENTIVE DETENTION

The Constitution does not mention preventive detention. It is also unclear how the various branches of government interact during national exigencies such as war. For instance, while Article II of the Constitution empowers the President to act as Commander in Chief, Article I of the Constitution states that “Congress shall have the power . . . [to] make rules concerning captures on land and water.” Article I also gives Congress the ability to “declare War”; “raise and support Armies”; and raise funds to “provide for the common Defense and general Welfare of the United States.” Harvard Law Professor Cass Sunstein observes that the “protection of national security is divided between Congress and the president – and that if either has a dominant role, it is Congress.”²⁶⁶ As a result of the tension over which branch controls national security, over the years the Supreme Court has filled in the contours of preventive detention.

The Supreme Court has stated that “[i]n our society liberty is the norm, and detention prior to trial or without a trial is the carefully limited exception.”²⁶⁷ Hence, the obvious starting point for creating a lawful regime of preventive detention is what constitutes these limited exceptions. As explained below, these exceptions seem to be for (1) pre-trial detention before trial; (2) detention of aliens who cannot be returned to their country of origin; (3) confinement based on mental illness; (4) quarantines for public health; and (5) detention based on the “war powers” of the executive.

1. Fourth and Fifth Amendments to the Constitution

The Fourth Amendment protects against arbitrary arrest and detention without probable cause, and generally requires a judicial determination of probable cause within

²⁶⁶ Cass Sunstein, “Monkey Wrench, The Supreme Court has always thwarted presidents who demand unlimited legal power in wartime,” *Legalaffairs*, (September/October 2005), http://www.legalaffairs.org/issues/September-October-2005/feature_sunstein_sepoct05.msp (accessed June 19, 2008).

²⁶⁷ *Salerno*, 481 U.S. at 755.

forty-eight hours of arrest.²⁶⁸ “Probable cause” exists if “the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”²⁶⁹ If the probable cause determination occurs after forty-eight hours, the burden is on the government to “demonstrate the existence of a bona fide emergency or other extraordinary circumstance.”²⁷⁰ While the procedure used to determine probable cause need not be adversarial in nature, it must provide a “fair and reliable determination of probable cause as condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”²⁷¹ If probable cause is found an individual is generally entitled to a “speedy and public trial” based on specific criminal charges.²⁷²

The Fifth Amendment of the Constitution states that no person may be “deprived of life, liberty, or property without due process of law.” The Supreme Court has found that the right to due process has both “substantive” and “procedural” aspects: “substantive due process” prevents the government from engaging in conduct that “shocks the conscience” or interferes with rights “implicit in the concept of ordered liberty.”²⁷³ A general principle of substantive due process is that the government may not detain a person prior to the judgment of guilt in a criminal trial.²⁷⁴ When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner, which is referred to as “procedural” due process.”²⁷⁵

²⁶⁸ *Gernstein v. Pugh*, 420 U.S. 103, 114 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

²⁶⁹ *Henry v. United States*, 361 U.S. 98, 102 (1959).

²⁷⁰ *McLaughlin*, 500 U.S. at 57.

²⁷¹ *Gernstein*, 420 U.S. at 125.

²⁷² U.S. Constitution, amend. 6.

²⁷³ *Salerno*, 481 U.S. at 746 (citations omitted).

²⁷⁴ *Foucha*, 504 U.S. at 83 (“our present system . . . , with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond a reasonable doubt to have violated criminal law”).

²⁷⁵ *Salerno*, 481 U.S. at 746.

While incarceration usually involves defendants convicted of crimes, the courts have traditionally recognized exceptions based on mental illness, quarantines, and “dangerousness.” With respect to the mental illness, the Supreme Court has held that a harm-threatening mental illness or “mental abnormality” can outweigh the “individual’s constitutionally protected interest in avoiding physical restraint” and that the government may detain mentally unstable individuals who present a danger to the public.²⁷⁶ With respect to quarantines, a state can implement mandatory quarantines under its inherent “police powers” to safeguard the health, safety, and welfare of its citizens.²⁷⁷ The federal government has residual authority under the Commerce Clause of the U.S. Constitution to prevent the interstate spread of disease.²⁷⁸

With respect to “dangerousness,” bail can be denied prior to trial under the Bail Reform Act of 1984.²⁷⁹ In order for an individual to be denied bail and held in pretrial detention, there must be an adversarial hearing, and a finding by a judge based on “clear and convincing” evidence that no conditions of release “will reasonably assure . . . the safety of any other person and the community.”²⁸⁰ The Supreme Court has found denial of bail to be a “permissible regulation” and not a punitive measure.²⁸¹ Significantly, a bail hearing occurs *after* criminal charges have been filed and after a probable cause hearing. Enemy combatants who are presumed to be dangerous are not being detained in pre-trial detention, and, as such, they have not been provided a bail hearing demonstrating their “dangerousness.”

Aliens may also be detained prior to deportation. In *Zadvydas v. Davis*, the Supreme Court held that the government cannot indefinitely detain an alien who has been

²⁷⁶ *Hendricks*, 521 U.S. at 356; see also *Addington v. Texas*, 441 U.S. 418 (1979).

²⁷⁷ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

²⁷⁸ The HHS Secretary has statutory responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the United States, e.g., at international ports of arrival, and from one state or possession into another. CDC, “Fact Sheet on Legal Authorities for Isolation/Quarantine,” May 3, 2005, <http://www.cdc.gov/ncidod/sars/factsheetlegal.htm> (accessed June 9, 2008).

²⁷⁹ *Bail Reform Act of 1984*, U.S. Code 18, §§ 3141-3150, 3156.

²⁸⁰ *Salerno*, 481 U.S. at 739.

²⁸¹ *Ibid.*, 747-48.

ordered deported but who cannot be repatriated to his home country. The Court held that individuals may only be detained for a “period reasonably necessary to bring about that alien’s removal from the U.S. [The statute] does not permit indefinite detention.”²⁸² Yet, the Supreme Court, while generally lambasting preventive detention, did note that “special arguments might be made for forms of preventive detention and for heightened deference to the judgments of political branches with respect to matters of national security.”²⁸³ As of a harbinger for how it would rule three years later in *Hamdi v. Rumsfeld*, the Supreme Court even noted in *Zadvydas* that “terrorism” may constitute such a “special argument.”²⁸⁴ In any event, although aliens can be detained prior to removal, the Supreme Court has made clear that even non-citizens cannot be indefinitely detained.

It would appear at first blush that any system of preventive detention for the purpose of interrogation and/or incapacitation *without* criminal charges being filed and unrelated to mental illness, removal, or quarantine would be unconstitutional and violate both substantive and procedural due process. The Supreme Court, however, has recognized exceptions to these core due process rights based on the “war powers” of the President under Article II of the Constitution, which states: “the President shall be Commander in Chief of the Army and Navy for the United States, and of the Militia of the several states, when called into the actual Service of the United States.”²⁸⁵ The Supreme Court has noted that “in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.”²⁸⁶

²⁸² *Zadvydas*, 533 U.S. at 689.

²⁸³ *Ibid.*, 696.

²⁸⁴ *Ibid.*

²⁸⁵ U.S. Constitution, art. 2, sec. 2.

²⁸⁶ *Salerno* 481 U.S. at 748.

2. War Powers of the President

Given the constitutional problems with detaining individuals indefinitely with no criminal charges, it makes sense that the Administration would look to the President's "war powers" to create a preventive detention regime. There is precedent, discussed below, that due process rights can be suspended during times of war. In addition, in all fairness, the Bush Administration has used its enemy combatant policy sparingly among U.S. persons. To date, it appears that only Padilla, Hamdi, and al-Marri were ever declared enemy combatants. Nonetheless, as discussed in Chapter II, the war paradigm approach is illogical and may prove to be unconstitutional if the Supreme Court ever decides on the issues raised in *al-Marri*, which, as of this writing, is the only enemy combatant case remaining concerning a U.S. person.

A look at significant war powers cases throughout America's history shows two recurring themes: (1) in times of emergency and crisis, the courts have traditionally (but not always) deferred to the executive branch, especially when Congress had already legislated or acquiesced on the matter; and (2) the Supreme Court is more likely to intervene after the exigencies of the crisis have passed. An understanding of how the executive, legislative, and judicial branches of the government have interacted and operated in past wartime emergencies helps place the current enemy combatant cases in a context.

Before discussing specific wartime cases, an understanding of the writ of habeas corpus is essential. Habeas corpus allows a prisoner to challenge the legality of his detention in federal court.²⁸⁷ It is a procedural remedy that by itself does not provide any substantive grounds for relief. Rather, a statutory or constitutional law violation must be shown in order for a detainee to be released from prison.²⁸⁸ The Supreme Court has held that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation

²⁸⁷ *Power to grant writ*, U.S. Code 28 (1994), § 2241.

²⁸⁸ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 258.

of relevant law.”²⁸⁹ Normally a prisoner brings a habeas petition after trial, conviction, and exhaustion of all appeals. In other words, it serves as a last “stopgap against injustice” and is “not a front-line defense.”²⁹⁰ By contrast, with respect to the enemy combatant detentions, habeas has become the main source of judicial review because “a viable front-end mechanism does not exist.”²⁹¹ As explained in Chapter II, President Bush initially failed to convene Article V or equivalent hearings to determine whether a detainee was an unlawful combatant or a civilian. While pursuant to *Hamdi* detainees are now provided some modicum of judicial review, the issue of habeas corpus will most likely continue to dominate the conversation until a better detention regime is created.

Significantly, on June 12, 2008, the Supreme Court held 5-4 in *Boumediene v. Bush* that the foreign nationals at Guantanamo Bay have a right to bring habeas petitions in federal court. Yet, this decision just means that the aliens at Guantanamo Bay have a right to be heard in federal court as U.S. persons do – it does not prescribe the standards or substance for review. In fact, the Supreme Court explicitly stated: “We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.”²⁹² In other words, the right to file a habeas petition is a procedural remedy. As Chief Justice John Roberts stated in his dissent, “The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date.”²⁹³ Hence, the substantive rights to be afforded the aliens at Guantanamo Bay are yet to be seen. In fact, as explained below, Padilla, Hamdi and have had the procedural remedy of habeas corpus (because they are U.S. persons) but the substantive details concerning the legality of their respective detentions still remains unclear. Al-Marri certainly has not received much benefit from his right to habeas corpus: he has

²⁸⁹ *INS v. St. Cyr*, 533 U.S. 289, 302 (2001).

²⁹⁰ Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 5.

²⁹¹ *Ibid.*

²⁹² *Boumediene*, slip op at 2.

²⁹³ *Ibid.*, slip op at 1 (Roberts, J., dissenting).

been detained as an enemy combatant with no charges since 2003, and in July 2008 the Fourth Circuit remanded his case for an evidentiary hearing. The foreign nationals at Guantanamo have just entered the legal abyss of uncertainty and minimalist holdings.

The Suspension Clause of the Constitution allows Congress to suspend the writ of habeas corpus “in Cases of Rebellion or Invasion” if the “public Safety . . . require[s]” it.²⁹⁴ As Law Professor Mark Tushnet explains, the Suspension Clause identifies the “occasions” that the writ can be suspended (“rebellion or invasion”) and the “criterion” for when it can be suspended (“public safety”).²⁹⁵ He ponders whether the attack on the World Trade Center and the Pentagon could constitute “invasions.”²⁹⁶ An argument could be made, however, that the founders of the Constitution could not have foreseen the threat posed by terrorism, especially in a world with weapons of mass destruction, and that a “rebellion” or “invasion” should incorporate such grave threats to the nation. Nevertheless, Congress is the branch of the government that has the power to suspend the writ, which, significantly, it has *not* done during the war on terror.²⁹⁷ In fact, in *Boumediene v. Bush* the Supreme Court specifically noted that Congress’s passing of the Military Commissions Act of 2006 to deal with the detention of the aliens at Guantanamo Bay was not a formal suspension of the writ.²⁹⁸

Congress has only suspended the writ four times in the nation’s history: (1) during the Civil War when Congress gave President Lincoln permission to suspend the writ *after* he had done so unilaterally (this example is discussed in more detail below); (2) during Reconstruction when Congress gave President Grant authority to suspend the writ in South Carolina where rebellion was raging; (3) during the Spanish-American war in 1902 when Congress gave President McKinley authority to suspend the writ to deal with

²⁹⁴ Art. 1, sec. 9, cl. 2 of the Constitution states: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in the Cases of Rebellion or Invasion, the public Safety may require.”

²⁹⁵ Tushnet, “Emergencies and the Idea of Constitutionalism,” 46.

²⁹⁶ *Ibid.*, 46-47.

²⁹⁷ Although the Suspension Clause does not mention Congress by name, because it is included in Article I, it is understood to be a power reserved to Congress. See *Hamdi*, 542 U.S. at 525 (noting that Congress has only suspended the writ in rare occasions).

²⁹⁸ *Boumediene*, slip op at 42.

insurrection in the Philippines; and (4) after the Pearl Harbor attack in 1941, Congress, at the request of the President, allowed the Governor of Hawaii to suspend the writ in the Hawaiian islands.²⁹⁹ In each of these instances, a rebellion or invasion was actually taking place in an American territory, and Congress responded by suspending the writ.

An argument could be made that al Qaeda's attacks on 9/11 are similar to Japan's air attacks on the naval base in Pearl Harbor. Congress allowed the writ to be suspended in Hawaii, however; it has not suspended the writ in response to 9/11. Furthermore, in *Duncan v. Kahanamoku*, the Supreme Court ruled that imposition of martial law and the closing of civilian courts in Hawaii eight months after the threat of invasion ceased was unlawful.³⁰⁰ While the Court recognized that a larger war with Japan was raging, Japan was nonetheless on the road to defeat. Thus, the risk of invasion was no longer sufficient to justify martial law when the civilian courts were functioning.³⁰¹ Such reasoning thereby calls into question whether Congress could even suspend the writ seven years after 9/11.

During the Civil War, President Lincoln suspended the writ *without* congressional approval based on asserted unilateral constitutional authority and detained approximately 13,000 civilians.³⁰² He ordered that military courts operate in areas threatened by Southern forces even though the civilian courts were fully functioning.³⁰³ By eliminating the writ, detainees could not challenge the legality of their respective detentions. In 1861, sitting as a circuit court judge, Chief Justice Taney ruled that President Lincoln lacked authority to suspend the writ without congressional approval.³⁰⁴ President Lincoln ignored the circuit court's holding and famously stated: "Are all the laws, but one, to go

²⁹⁹ James Terry, "Habeas Corpus and the Detention of Enemy Combatants in the War on Terror," *JFQ*, Issue 48 (1st Quarter 2008): 15-16.

³⁰⁰ *Kahanamoku*, 327 U.S. 304.

³⁰¹ *Ibid.*, 313-14, 324.

³⁰² Seth Waxman, "Combatant Detention through the Lenses of History," 6.

³⁰³ Tushnet, "Emergencies and the Idea of Constitutionalism," 126.

³⁰⁴ *Ex parte Merryman*, 17 Fed. Cas. 144 (1861).

unexecuted, and the government itself go to pieces, lest that one be violated?”³⁰⁵ President Lincoln, of course, was dealing with the existential fate of the nation.

In 1863, when it returned to session, Congress enacted legislation suspending the writ of habeas corpus, thereby validating to some extent President Lincoln’s previous unilateral suspension of the writ and obviating Justice Taney’s concern. When the matter initially reached the Supreme Court in 1864, it refused to rule based on a technical jurisdictional argument (which foreshadows how the Supreme Court treated Padilla in 2004, discussed below).³⁰⁶ A year *after* the Civil War ended, the Supreme Court held in *Ex parte Milligan* that President Lincoln and Congress lacked the constitutional power to suspend the writ and establish martial law when the civilian courts were operating. While citizens could be *held* without charges if the writ was properly suspended, they could not be tried by military tribunals. In fact, the Court noted that “[m]artial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such that effectually closes the courts and deposes the civil administration.”³⁰⁷ In other words, a majority of the Court found that neither branch had the authority to try civilians in military courts when civilian courts were still operating.

Significantly, the Supreme Court did not intervene *during* the Civil War but only after it was over, noting its institutional weakness during times of emergency: “During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. . . . Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.”³⁰⁸ It is also significant that Congress ultimately did intervene and suspend the writ, although President Lincoln claimed that he always had the inherent

³⁰⁵ Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) in *The Collected Works of Abraham Lincoln* 421, 430 (Roy P. Basler ed., 1953).

³⁰⁶ *Ex parte Vallandigham*, 68 U.S. (1 Wall) 243 (1864).

³⁰⁷ *Ex parte Milligan*, 71 U.S. at 127.

³⁰⁸ *Ibid.*, 109.

constitutional authority to act unilaterally.³⁰⁹ In sum, *Ex parte Milligan* holds that civilians may not be tried by military tribunals if the civilian courts are fully functioning. The decision, however, did not address whether enemy combatants – as opposed to civilians – could be tried by military tribunals. That decision came during a World War II case called *Ex parte Quirin*.

In the seminal case *Ex parte Quirin*, the Supreme Court noted that the Constitution invests “the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.”³¹⁰ In *Ex parte Quirin*, the Supreme Court held that U.S. citizens could be labeled “unlawful combatants” and tried by a military commission. As such, the Bush Administration has heavily relied on *Ex parte Quirin* to justify its current enemy combatant policy.

Yet, *Quirin* did not address in any way whether the President could declare people, especially U.S. citizens, enemy combatants and hold them indefinitely with no criminal charges. *Quirin* involved the question of whether members of the German army, who surreptitiously infiltrated to the United States in civilian clothes to conduct sabotage on military installations during World War II, could be tried by military commission for alleged war crimes as Congress had authorized or had to be tried by the civilian courts, which were fully functioning. While the saboteurs in *Quirin* were labeled “unlawful combatants” (because they wore civilian clothes and did not wear uniforms as required by the Geneva Convention), they were (1) allowed counsel (2) not held indefinitely but tried before a military tribunal and (3) given specific charges. Furthermore, the defendants in *Quirin* (including a U.S. citizen) admitted they were enemy combatants; their argument was they should be tried before the civilian Article III courts which were fully functioning and not a military tribunal. By contrast, Hamdi, Padilla and al-Marri all

³⁰⁹ Issacharoff and Pildes, “Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,” 167.

³¹⁰ *Ex parte Quirin*, 317 U.S. at 26.

dispute they are enemy combatants. In other words, while the Bush Administration touts *Quirin* as justification for its present enemy combatant policy, an understanding of the underlying facts demonstrates that *Quirin* is largely inapposite and not analogous to the current enemy combatant cases.

Furthermore, Congress had generally authorized the military commissions used to try the German saboteurs. The Supreme Court in *Quirin* refused to address whether the President, acting unilaterally, could bypass the civilian courts to try U.S. citizens by military commission: “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”³¹¹ As law professors Issacharoff and Pildes observe, “the Court upheld President Roosevelt’s actions precisely because he was exercising authority that Congress had expressly delegated to him.”³¹²

The most notorious example of preventive detention based on the war powers of the President was the internment of Americans of Japanese ethnicity during World War II. In *Hirabayashi v. United States*³¹³ and *Korematsu v. United States*,³¹⁴ the Supreme Court upheld national-origin specific regulations based on broad deference to the war-making powers of the President and Congress. In *Hirabayashi*, the Court upheld curfew orders that had been authorized by Congress relating to Japanese Americans on the West Coast and in *Korematsu* the Court upheld the initial evacuation orders requiring the Japanese to leave the West Coast. Yet, in *Ex parte Endo* – a case decided the same day as *Korematsu* – the Supreme Court unanimously held that indefinite detention of a loyal citizen such as Endo was unlawful.³¹⁵ *Korematsu* and *Endo*, however, were decided two

³¹¹ *Ex parte Quirin*, 317 U.S. at 26.

³¹² Issacharoff and Pildes, “Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,” 178.

³¹³ *Hirabayashi*, 320 U.S. 81.

³¹⁴ *Korematsu*, 323 U.S. 214.

³¹⁵ *Ex parte Endo*, 323 U.S. 283, 302-03 (1944).

years *after* the initial evacuation orders, and the practical question was whether *continued* detention was permissible. The President – perhaps getting notified that the Court was going to find the detentions unlawful – ordered the relocation camps closed one day before *Endo* was decided.³¹⁶

Several key points concerning detention and unilateral executive action can be gleaned from the Japanese internment cases. First, Congress had specifically authorized the curfew orders in *Hirabayashi* and the initial evacuation orders in *Korematsu* – hence, as in *Ex parte Quirin*, the question of whether the President had unilateral war powers to implement such measures was left unresolved. By contrast, Congress had not authorized the detention camps in *Endo*. In other words, during World War II, the Supreme Court felt more comfortable sustaining war time measures infringing on civil liberties when Congress had approved of the measures. Second, similar to how the Supreme Court delayed acting in *Ex parte Milligan* until the civil war ended, the Supreme Court did not interfere and strike down the President’s war powers until the immediate threat had dissipated. *Endo* was decided two years after the internment camps had been operating and decided a day after the President closed the internment camps (although he probably closed them in anticipation of the Supreme Court decision). Hence, there seems to be a pattern of the Supreme Court deferring during the emergency crisis to the executive and legislative branches and then ruling after calmness and normalcy have been restored.

Third, no one seems to remember *Endo* but only *Hirabayashi* and *Korematsu*.³¹⁷ The general consensus of the Japanese internment cases is that the President, Congress *and* the Supreme Court overreacted to threats to national security by imposing national-origin specific regulations on an entire group of people without any specific reasonable suspicion. Because the Supreme Court did not decide *Endo* until after it was essentially moot (i.e., the detainees were released), its significance was greatly lessened and to some extent undermined as the majority of the American public does not realize that the Supreme Court actually found the indefinite internment of loyal Japanese Americans to

³¹⁶ Issacharoff and Pildes, “Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,” 175.

³¹⁷ See generally Patrick Gudridge, “Remember *Endo*?” *Harvard Law Review*, 116 (May 2003): 1933-1970.

be unlawful. As discussed below, al-Marri has been detained as enemy combatant since 2003, so his detention is approaching six years. If the new Administration decides to release him – or transfer him to the criminal justice system as it did Padilla – any subsequent decision in al-Marri may similarly not be remembered. Will al-Marri be the next *Endo*?

The next significant war power case concerned President Truman’s seizure of the steel mills because of an anticipated strike to ensure continued production during the Korean War. President Truman claimed he had inherent constitutional authority as Commander in Chief to avert a “national catastrophe which would inevitably result from the stoppage of steel production.”³¹⁸ Significantly, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court struck down President Truman’s seizure of the steel mills finding that it went beyond his role as Commander in Chief because the seizures took place outside the “theater of war.”³¹⁹ Furthermore, the Supreme Court held that, because there was not a formal declaration of war by Congress, there was a lack of congressional authorization for the asserted wartime powers. Moreover, the Court noted that Congress had, in fact, expressly rejected allowing the executive to seize industrial plants as a solution to strikes when it enacted the Taft-Hartley Act of 1947.³²⁰ In a famous concurring opinion on the balance between executive and legislative powers in times of emergencies, Justice Robert Jackson wrote:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.³²¹

³¹⁸ *Youngstown*, 343 U.S. at 582.

³¹⁹ *Ibid.*, 587.

³²⁰ *Ibid.*, 586.

³²¹ *Ibid.*, 637-38 (Jackson, J., concurring).

With respect to the current enemy combatant policy, two significant questions can be gleaned from *Youngstown*. First, to what extent is the executive's capture of Padilla and al-Marri in peaceful civilian areas similar to President Truman's attempt to seize the steel mills? Arguably, both are away from the "theater of war." Second, to what extent has Congress acquiesced or allowed the detention of enemy combatants? There has been no formal declaration of war. As explained below, while President Bush asserts that Congress provided statutory authority with the Joint Resolution passed immediately after 9/11, this argument to support indefinite detention of U.S. persons captured in civilian areas appears tenuous at best.

3. Enemy Combatant Cases: *Hamdi*, *Padilla*, and *al-Marri*

a. *Hamdi*

In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court (consisting of Justice O'Connor who authored the decision and former Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) held that the executive could label a U.S. citizen captured in a zone of combat as an enemy combatant and hold that individual indefinitely for the duration of the war in Afghanistan as long as that individual "receive[d] notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."³²² Significantly, because of the "exigencies of the circumstances," the plurality noted that during the adversarial proceedings there could be a rebuttable presumption in favor of the government. Once the government put forth "credible evidence" that the detainee met the enemy combatant criteria, the burden would shift to the detainee to submit "more persuasive evidence" that he fell outside the criteria.³²³ Furthermore, the plurality noted that hearsay evidence "may need to be accepted as the most reliable available evidence."³²⁴

³²² *Hamdi*, 542 U.S. at 533.

³²³ *Ibid.*, 533-34.

³²⁴ *Ibid.* Interestingly, in July 2008, the Fourth Circuit honed in on *Hamdi*'s language that hearsay evidence "*may* need to be accepted as the most reliable evidence" (emphasis added) and argued that the government would need to prove that nonhearsay evidence was otherwise unavailable. *al-Marri v. Pucciarelli*, 2008 WL 2736787, * 45.

According to a sworn declaration based on hearsay from the Northern Alliance, Hamdi had surrendered with an enemy unit in a theater of combat in Afghanistan while armed with an AK-47. Hamdi, however, claimed he was in Afghanistan for a humanitarian mission. By the time his case reached the Supreme Court, he had been held for *more than two years* without charges or access to counsel. After the plurality of the Supreme Court held that he could be labeled an enemy combatant as long as he was first provided an opportunity to rebut the underlying evidence, the Administration released him to his family in Saudi Arabia without any kind of adversarial hearing, stating that he no longer posed a threat to the United States. As a condition of his release, he gave up U.S. citizenship.³²⁵

While the plurality upheld the executive's ability to detain U.S. citizens captured on a battlefield as enemy combatants as long as they are provided an opportunity to challenge the designation in some neutral forum, Justice Scalia (joined by Justice Stevens) wrote a lengthy dissent arguing that there was no constitutional authority for the Administration's enemy combatant policy: "If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him."³²⁶ Justice Scalia argued that the Administration had two choices for detaining citizens like Hamdi: (1) get Congress to suspend the writ of habeas corpus or (2) try suspected terrorists on specific criminal charges in civilian courts.

As explained above, the writ of habeas corpus allows individuals to challenge the legality of their detention at a hearing, and Congress has the authority to "suspend" the writ "in Cases of Rebellion or Invasion."³²⁷ Hence, according to Justice Scalia, if the Administration considered the 9/11 attacks an "invasion" and asserted that it is currently responding to that "invasion," Congress could suspend the writ, which it had

³²⁵ Isikoff and Hosenball, "Out of the Brig: 'Enemy Combatant' Yaser Hamdi Will Soon be Released from a Military Prison without Facing Any Charges."

³²⁶ *Hamdi*, 542 U.S. at 576.

³²⁷ Art. 1, sec. 9, cl. 2.

not done. Justice Scalia stated: “Absent suspension . . . the Executive’s assertion of military exigency has not been thought sufficient to permit detention without charge.”³²⁸ If the writ is not suspended, then Justice Scalia asserted that terrorism suspects must be charged with specific crimes or set free.

Justice Clarence Thomas also dissented but under a strikingly different rationale. He argued that not only did the executive have authority to detain indefinitely U.S. citizens as enemy combatants, he maintained that the courts did not have the information or expertise to interfere with the executive’s decision-making process. Hence, according to Justice Thomas, there was no need to provide Hamdi with any opportunity to challenge his designation as an enemy combatant before a neutral decision-maker because the President can make “virtually conclusive factual findings” on who is an “enemy combatant.”³²⁹ In fact, Justice Thomas noted in italics (so the point was not missed) that the President could detain Hamdi indefinitely “*even if he is mistaken.*”³³⁰ Justice Thomas also noted that detention could be justified for interrogation or preventing the detainee from returning to the battlefield.³³¹

While *Hamdi* did limit unilateral executive detention by forcing the government to provide some meaningful review to its detainees, it failed to address (1) how long a U.S. citizen can be detained as an enemy combatant before the judicial review begins; (2) how long a U.S. citizen can be held incommunicado and without access to counsel; and (3) how long a U.S. citizen can be held overall as an enemy combatant with no criminal charges. Justice O’Connor had contemplated “generations” and, while troubled, acknowledged the “substantial prospect of perpetual detention.”³³²

In sum, *Hamdi* was a very narrow decision which did not even garner a majority, leaving many pivotal questions unanswered. As law professors Posner and Vermeule observe, “[a]s of the present, it is simply not clear what the consequences of

³²⁸ *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

³²⁹ *Ibid.*, 589. (Thomas, J., dissenting).

³³⁰ *Ibid.*, 590. (Emphasis in original).

³³¹ *Ibid.*, 595.

³³² *Ibid.*, 520 (plurality).

Hamdi are, or even whether it is a consequential decision at all.”³³³ Law Professor Ackerman cynically notes: “Although the popular press has haled *Hamdi* for reining in presidential power, I take a much dimmer view: a few more victories like this, and civil liberties will become an endangered species in the United States of America.”³³⁴ Nonetheless, based on *Hamdi*, it is clear that, at a minimum, any proposed alternative preventive detention regime must allow the detainees a meaningful opportunity to challenge the underlying factual evidence necessitating their preventive detention.

b. *Padilla*

Significantly, the Supreme Court has not yet addressed whether a U.S. citizen arrested in the United States (and not on a battlefield as was *Hamdi*) can be detained indefinitely with no charges based on the war powers of the President. This factual scenario was presented by Jose Padilla, a U.S. citizen arrested in May 2002 at Chicago’s O’Hare International Airport after an overseas trip to Pakistan where he allegedly had been training with al Qaeda operatives. Upon arrest, Padilla was carrying \$10,526, a cell phone, and e-mail addresses for al Qaeda operatives.³³⁵ As explained in Chapter III, the Administration argued that Padilla was planning to detonate a radioactive bomb in American and designated him an enemy combatant in June 2002 after initially detaining him on a material witness warrant.³³⁶ On December 18, 2003, the Second Circuit held that the President lacked the authority to indefinitely detain a U.S. citizen arrested in the United States as an enemy combatant and gave the Administration 30 days to release him or transfer him to the criminal justice system.³³⁷ The Bush Administration then requested an expedited writ of certiorari to the Supreme Court.

For a five person majority, former Chief Justice William Rehnquist held that there was no federal district court jurisdiction to hear Padilla’s case because his

³³³ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 253.

³³⁴ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 29.

³³⁵ Laura Parker, “Padilla Charges Don’t Measure Up to Accusations,” *USA Today*, July 18, 2007, http://www.usatoday.com/news/nation/2007-07-18-padilla-charges_N.htm (accessed September 4, 2007).

³³⁶ *Ibid.*

³³⁷ *Padilla*, 352 F. 3d 695.

habeas petition was filed in the wrong jurisdiction (Southern District of New York, where he was initially held as a material witness) and would need to be re-filed in the federal district where he was currently being detained by the military as an enemy combatant (District of South Carolina):

We confront two questions: First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily. We answer the threshold question in the negative and thus do not reach the second question presented.³³⁸

In Justice Stevens' dissent (joined by Justices Souter, Ginsburg and Breyer), he argued that "slavish application" to a "bright line rule" was unfortunate because Padilla's attorney had not been provided fair notice of his transfer to South Carolina.³³⁹ He wrote:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating or preventing subversive activities is in the hallmark of the Star Chamber.³⁴⁰

In sum, despite Justice Stevens' passionate dissent, the Supreme Court failed to address the merits concerning Padilla's incommunicado confinement as an enemy combatant.

Padilla's attorneys re-filed his habeas petition in the District of South Carolina and the process of judicial review began anew. While the district court found Padilla's detention unauthorized because he was not arrested in a foreign zone of combat,³⁴¹ the Fourth circuit reversed, holding that the rationale to incapacitate Padilla so he would not return to the battlefield was indistinguishable from the facts in *Hamdi*.³⁴² Interestingly, during this second round of litigation, the Administration emphasized that

³³⁸ *Padilla*, 542 U.S. at 430.

³³⁹ *Ibid.*, 455 (Stevens, J., dissenting).

³⁴⁰ *Ibid.*, 465.

³⁴¹ *Padilla*, 389 F. Supp. 2d at 690-91.

³⁴² *Padilla*, 423 F.3d at 392-93.

Padilla had taken up arms with the Taliban and al Qaeda in Afghanistan (before his detention in Chicago) and needed to be incapacitated so he did not return to the battlefield, ostensibly trying to make the facts more similar to *Hamdi*, which had been decided on the same day the Supreme Court remanded *Padilla*. Specifically, the Administration asserted in its brief to the Fourth Circuit: “Padilla’s combat activities in Afghanistan are not materially distinguishable from Hamdi’s and so Padilla fits squarely within the enemy combatant definition that the Supreme Court utilized in *Hamdi*.”³⁴³ Padilla appealed to the Supreme Court.

Just a few days before the Supreme Court deadline for Bush administration briefs on the question of the President’s powers to continue holding Padilla in military prison without charge, the Administration transferred him to the criminal justice system in November 2005, presumably to avoid a show-down over the enemy combatant policy and to allow the Fourth Circuit’s favorable ruling to stand. After three and one-half years as an enemy combatant, and extensive proceedings before the U.S. district courts, the courts of appeal, and Supreme Court, on August 16, 2007, a federal jury convicted Padilla on criminal conspiracy and terrorism-related charges.³⁴⁴ Padilla was never charged with planning to detonate a radioactive bomb, which was the initial justification for the enemy combatant designation.³⁴⁵

c. Al-Marri

On June 11, 2007, a divided Fourth Circuit (2-1) held in *al-Marri v. Wright* that Ali al-Marri, a legal resident from Qatar, arrested in Peoria, Illinois in December 2001 and designated as an enemy combatant in June 2003, could not be locked up indefinitely with no charges.³⁴⁶ Federal investigators had found credit card numbers

³⁴³ Opening Brief for Appellant, *Padilla v. Hanft*, No. 05-6396, *22-23 (filed on May 6, 2005) (available on Westlaw at 2005 WL 1521249).

³⁴⁴ Peter Whorisky, “Jury Convicts Jose Padilla of Terror Charges,” *Washington Post*, August 16, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081601009.html> (accessed September 4, 2007).

³⁴⁵ *Ibid.*

³⁴⁶ *al-Marri*, 487 F.3d 160.

on al-Marri's computer and initially charged him with credit card fraud.³⁴⁷ Upon further investigation, the government alleged that al-Marri was a "sleeper agent" for al Qaeda who entered the United States with his family on September 10, 2001, trained at an al Qaeda camp in Afghanistan, met with Bin Laden, KSM, and other terrorist leaders, and had used his laptop computer to research weapons of mass destruction.³⁴⁸ Of particular interest to the government were al-Marri's alleged contacts with Mustafa Ahmed al-Hawsawi – an alleged paymaster and travel coordinator for al Qaeda who is currently being detained at Guantanamo Bay.³⁴⁹ In rejecting the Administration's designation of al-Marri an enemy combatant, the Fourth Circuit stated: "Put simply, the Constitution does not allow the President to order the military to seize civilians residing within the United States and then detain them indefinitely without criminal process, and this is so even if he calls them 'enemy combatants.'"³⁵⁰ The Fourth Circuit noted that an individual could be detained as an enemy combatant only if he takes up arms with the military arm of a foreign government – not for being an alleged member of an international terrorist group.³⁵¹ The Fourth Circuit distinguished *Hamdi* and *Padilla* by noting that they both had been working at the direction of Taliban forces rather than just al Qaeda (even though Padilla was ultimately detained in Chicago and not Afghanistan).³⁵² Consequently, the Fourth Circuit held that al-Marri must be transferred to the civilian court system and tried on criminal charges, deported, held as a material witness, or be set free.³⁵³ As a result of this adverse decision, the Administration asked the full Fourth Circuit to review the case. On August 22, 2007, a majority of the Fourth Circuit judges agreed to grant *en banc* review of the decision.

On July 15, 2008, the full Fourth Circuit ruled in a split 5-4 decision that while the President could detain a legal resident (and presumably U.S. citizens) captured

³⁴⁷ "Court Overrules Bush's 'Enemy Combatant' Policy."

³⁴⁸ *al-Marri*, 443 F. Supp. 2d at 782-84.

³⁴⁹ White, "Lawyers Fear for Marri's Sanity."

³⁵⁰ *al-Marri*, 487 F.3d at 193.

³⁵¹ *Ibid.*, 181-83.

³⁵² *Ibid.*, 180-181.

³⁵³ *Ibid.*, 195.

in a peaceful civilian area as an enemy combatant, al-Marri needed to be provided more due process. The Fourth Circuit addressed two questions: First, assuming the allegations against al-Marri were true, did Congress authorize the President to detain al-Marri as an enemy combatant, and second, assuming Congress had empowered the President to detain al-Marri as an enemy combatant, was al-Marri provided sufficient due process (per *Hamdi*) to challenge his designation as an enemy combatant.³⁵⁴ Significantly, four judges agreed with the government on both questions and found that the President did have authority to designate legal residents caught in a civilian area as enemy combatants and that the Administration had submitted sufficient evidence through a declaration to justify such treatment. A different four judges agreed with al-Marri on both points and found that the President did not have the power to detain legal residents caught in America as enemy combatants and that al-Marri had not been provided sufficient due process. Judge William Traxler Jr. essentially broke the tie by holding that, while the President did have the authority to detain legal residents as enemy combatants, the government's declaration based on hearsay was *not necessarily* sufficient evidence to justify such treatment.³⁵⁵ The four judges who would have preferred to rule that the President did not have authority to detain al-Marri as an enemy combatant reluctantly joined Judge Traxler in his opinion to give "practical effect" and order a remand on the "terms closest" they would impose.³⁵⁶ As of this writing, al-Marri is pending an evidentiary hearing, and it is unclear whether either party will request an interlocutory appeal to the Supreme Court and if so, whether the Court would even grant certiorari. (The Supreme Court refused to grant certiorari while the case was waiting the Fourth Circuit's *en banc* ruling.)

³⁵⁴ *al-Marri*, 2008 WL 2736787, * 1.

³⁵⁵ Judge Traxler noted that while the plurality in *Hamdi* held that hearsay evidence could be used if it was the "most reliable available evidence," in al-Marri's case, Judge Traxler found that there was not sufficient inquiry into whether "nonhearsay evidence would unduly burden the government," especially because al-Marri was detained in a U.S. city and not a battlefield as was Hamdi. *Ibid.*, 2008 WL 2736787, * 45.

³⁵⁶ Specifically, these four judges stated: "We believe that it is unnecessary to litigate whether al-Marri is an enemy combatant, but joining in remand for the evidentiary proceedings outlined by Judge Traxler will at least place the burden on the Government to make an initial showing that normal due process protections are unduly burdensome and that the Rapp declaration is 'the most reliable available evidence' supporting the Government's allegations before it may order al-Marri's military detention." *Ibid.*, 2008 WL 2736787, * 31.

Therefore, as of now, the Supreme Court has not ruled on the pivotal constitutional question of whether U.S. citizens, such as Padilla, or legal residents, such as al-Marri, can be detained indefinitely as an enemy combatant with no criminal charges. The Supreme Court has ruled that the President can designate citizens caught in an active zone of combat as enemy combatants for the duration of the particular conflict as long as the individual can challenge that designation in a neutral forum. Nonetheless, even with minimal judicial review as contemplated in *Hamdi*, it remains unclear how long a person can be detained preventively without criminal charges and how long a person can be detained incommunicado before initial judicial review. As journalist Wittes astutely notes, “[i]t overstates the matter to say that the enemy combatant cases were full of sound and fury and signifying nothing, but they certainly signified a great deal less than their sound and fury portended.”³⁵⁷ In sum, there is legal uncertainty surrounding these key issues, which ironically provides some flexibility in analyzing and proposing alternative regimes of preventive detention to the enemy combatant policy.

B. STATUTORY CONCERNS WITH PREVENTIVE DETENTION

In 1950, Congress passed the Emergency Detention Act (EDA) which authorized the President to declare an “Internal Security Emergency” during which the President could authorize the detention of any person deemed reasonably likely to engage in acts of espionage or sabotage.³⁵⁸ Significantly, the EDA was never used, and it was repealed before any court had the opportunity to rule on its constitutionality.³⁵⁹

In 1971, Congress enacted 18 U.S.C. § 4001(a), dubbed the Non-Detention Act, which repealed the EDA, and provided that: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The legislative history suggests Congress intended to prevent the recurrence of internments or detention

³⁵⁷ Wittes, “Judicial Baby-Splitting,” 106.

³⁵⁸ *Emergency Detention Act, U.S. Statutes at Large* 64 (1950): 1019.

³⁵⁹ Jennifer Elsea, “Detention of American Citizens and Enemy Combatants,” *Congressional Research Service Report for Congress* (CRS Order Code RL31724), 53, <http://www.fas.org/sgp/crs/natsec/RL31724.pdf> (accessed September 4, 2007).

camps such as those that occurred during World War II.³⁶⁰ In signing the 1971 legislation, President Nixon explained that the Administration was “wholeheartedly” in support of the repeal of the Emergency Detention Act, and that he wanted “to underscore this Nation’s abiding respect for the liberty of the individual. Our democracy is built upon the constitutional guarantee that every citizen will be afforded due process of law. There is no place in American life for the kind of anxiety – however unwarranted – which the Emergency Detention Act has evidently engendered.”³⁶¹

Not surprisingly, Padilla, Hamdi, and al-Marri have all argued that, based on 18 U.S.C. § 4001(a), Congress forbade the detention of U.S. persons without explicit statutory authority. The Administration has countered that Congress’s “Joint Resolution” or “Authorization for Use of Military Force” (AUMF) after 9/11 provided statutory authority to detain U.S. persons (as well as aliens) in the war on terror.³⁶² The AUMF provides the executive with authority to “use all necessary and appropriate force against those . . . organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such . . . organizations or persons.”³⁶³

In *Hamdi*, a plurality of the Supreme Court affirmed the President’s powers to detain enemy combatants as part of the “necessary and appropriate force” (i.e., the AUMF) authorized by Congress after the terrorist attacks of September 11, 2001. The plurality found the President’s detention of U.S. citizens was not foreclosed by 18 U.S.C. § 4001(a), which, as explained above, provides that no U.S. citizen may be detained except pursuant to an act of Congress. Specifically, Justice O’Connor noted: “[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of

³⁶⁰ Elsea, “Detention of American Citizens and Enemy Combatants,” 48.

³⁶¹ Presidential Statement upon Signing the Bill Repealing the Emergency Detention Act, 1971 Pub. Papers 986 (September 25, 1971) quoted in Louis Fisher, “Detention and Military Trial of Suspected Terrorists,” *Journal of National Security Law and Policy*, 2:1 (2006): 33.

³⁶² AUMF, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 224.

³⁶³ *Ibid.*

waging war, in permitting use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”³⁶⁴ Significantly, the plurality emphasized that the scope of the AUMF was limited to individuals who “fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks” and that “detention of individuals falling into the *limited category* we are considering, for the *duration of the particular conflict in which they were captured*, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”³⁶⁵ Thus, *Hamdi* seems to be limited by the salient fact that he was arrested on a battlefield in Afghanistan during an actual conflict.

Because the plurality in *Hamdi* found statutory authority (i.e., AUMF) for labeling individuals as enemy combatants, the Court did not address the Bush Administration’s alternative argument that it had plenary constitutional authority to preventively detain individuals as enemy combatants. Justice O’Connor noted: “We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF.”³⁶⁶ In other words, it is an unsettled question whether – independent of any statutory authority such as the AUMF – the President has inherent constitutional authority under Article II of the Constitution to detain individuals as enemy combatants without congressional approval.

Some commentators have argued that the Supreme Court plurality in *Hamdi* *precluded* interrogation to gain intelligence as a rationale for indefinite detention and that only incapacitation for the duration of the specific hostilities in a zone of combat was

³⁶⁴ *Hamdi*, 542 U.S. at 519.

³⁶⁵ *Ibid.*, 518. (Emphasis added). Justices Ruth Ginsburg and David Souter did not agree that Congress had authorized indefinite detention but joined the plurality opinion that Hamdi was entitled to review of his detention by a neutral decision-maker.

³⁶⁶ *Ibid.*, 517.

justifiable.³⁶⁷ Although the *Hamdi* plurality did hold that Hamdi could be held as an enemy combatant for the duration of the particular conflict in Afghanistan and not for purposes of interrogation, a close reading of *Hamdi* does not automatically preclude Congress from creating a regime that would allow preventive detention for purposes of interrogation. Justice O'Connor stated that "indefinite detention for the purpose of interrogation is not authorized" under the AUMF.³⁶⁸ In other words, Justice O'Connor is stating that the AUMF – a statute passed by Congress – does not authorize indefinite detention for purposes of interrogation. She is not stating that Congress does not have the authority to create such a regime, or that if it did, such a regime would be automatically unconstitutional.

In fact, Justice Scalia in his *Hamdi* dissent acknowledged that interrogation of terrorist suspects may be a legitimate need but implored Congress – not the Executive – to address the issue: "I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's."³⁶⁹ Therefore, Justice Scalia at least contemplates a need for preventive detention based on interrogation and notes that Congress could create such a regime. Finally, Justice Thomas in his *Hamdi* dissent also found intelligence gathering to be a valid interest of the government in the war on terror.³⁷⁰

While the plurality in *Hamdi* found the AUMF to authorize the detention of U.S. citizens caught in an active zone of combat as enemy combatants, in *al-Marri*, the Fourth Circuit initially found that the AUMF did not provide the Administration with the statutory authority to classify civilians captured in the United States as enemy combatants: "[W]e note that the AUMF itself contains nothing that transforms a civilian into a combatant subject to indefinite military detention. Indeed, the AUMF contains

³⁶⁷ Wald, "The Supreme Court Goes to War," 50-51; Waxman, "Combatant Detention through the Lenses of History," 14.

³⁶⁸ *Hamdi*, 524 U.S. at 521.

³⁶⁹ *Ibid.*, 578 (Scalia, J., dissenting).

³⁷⁰ *Ibid.*, 595 (Thomas, J., dissenting).

only a broad grant of war powers and lacks any specific language authorizing detention.”³⁷¹ Yet, after an *en banc* ruling by the Fourth Circuit in July 2008, five judges held that the AUMF did provide the necessary authority for the President to detain legal residents caught in peaceful civilian areas as enemy combatants.³⁷²

Nonetheless, the legislative history of the AUMF suggests that Congress explicitly did not intend for the President to be able to indefinitely detain civilians captured in the United States. During debate in the U.S. Senate, Department of Justice officials lobbied to have the words “in the United States” added after the phrase “use all necessary and appropriate force,” which would have granted the President war powers to do anything he wanted within the U.S.³⁷³ Because this phrase was not included in the final AUMF, it can be inferred that Congress did not intend for the President to use his war powers within the confines of the United States. Therefore, it appears to be a legal stretch to argue that the AUMF provides the necessary statutory authority to detain U.S. persons captured in a peaceful civilian area within the United States as opposed to someone like Hamdi who was captured and detained on an actual battlefield in Afghanistan.

Had the government not transferred Padilla to the criminal justice system in November 2005, it is not at all clear whether the Supreme Court would have upheld the government’s right to detain Padilla – a U.S. citizen detained in the United States (as opposed to Hamdi captured in a war-zone in Afghanistan) – as an enemy combatant pursuant to the AUMF. In fact, in *Rumsfeld v. Padilla*, where the majority dismissed his habeas petition on jurisdictional grounds, the four dissenters, namely Justices Stevens, Breyer, Souter, and Ginsburg, would have found indefinite detention of a U.S. citizen captured in America for incommunicado detention ***prohibited*** under 18 U.S.C. § 4001(a) and ***not*** supported by the AUMF.³⁷⁴ Furthermore, Justice Scalia, who joined the majority in remanding Padilla’s habeas petition on jurisdictional grounds, argued in his *Hamdi*

³⁷¹ *al-Marri*, 487 F.3d at 188.

³⁷² *al-Marri*, 2008 WL 2736787 ** 59-128.

³⁷³ Suskind, *The One Percent Doctrine*, 17.

³⁷⁴ *Padilla*, 542 U.S. at 455 (Stevens, J., dissenting).

dissent that the AUMF did not authorize detention of U.S. citizens as enemy combatants.³⁷⁵ In other words, there are five current Justices who would likely not find that the AUMF provides the requisite statutory support to support President Bush's enemy combatant policy.

Nonetheless, as of this writing, the Supreme Court has not addressed the constitutional and statutory issues with respect to the Administration's enemy combatant policy concerning civilians arrested in the United States. It is not clear that the Supreme Court would hold that the AUMF provides the necessary *statutory* authority to support the Administration's broad approach to its enemy combatant policy for U.S. persons arrested in the United States and not on a battlefield.

Interestingly, the USA Patriot Act – legislation more specific than the AUMF – does *not* support indefinite detentions of U.S. persons.³⁷⁶ Rather, the statute mandates that aliens be charged with criminal or immigration violations within *seven* days of arrest if the alien endangers the national security, or successive six-month periods if the alien cannot be removed and remains a threat to the national security of the U.S. or the safety of the community or any person.³⁷⁷ It seems incongruous that Congress would allow aliens to be detained for finite periods of time based on showings of danger to national security while allowing U.S. persons to be detained indefinitely. In fact, Congress rejected a provision in a draft bill of the Patriot Act that would have allowed the Attorney General to detain without charge any alien he “has reason to believe may commit, further, or facilitate acts [of terrorism].”³⁷⁸ Furthermore, given the specific wording of the USA

³⁷⁵ *Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting).

³⁷⁶ Association of the Bar of the City of New York, Committee on Federal Courts, “The Indefinite Detention of ‘Enemy Combatants’: Balancing Due Process and National Security in the Context of the War on Terror,” 111.

³⁷⁷ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act)*, Public Law 107-56, *U.S. Statutes at Large* 115 (2001): 272, codified at *U.S. Code* 8, §§ 1226(a)(5) and (6).

³⁷⁸ Reply Brief of Appellants, *al-Marri v. Wright*, No. 06-7427, *17 (filed January 17, 2007) (available on Westlaw at 2007 WL 261569).

Patriot Act, and the general wording of the AUMF, it seems unlikely that the Supreme Court would find the AUMF as explicit statutory support to detain U.S. citizens arrested in the United States and not on a battlefield.

C. CONCLUSION

While it appears that President Bush has only designated three U.S. persons as enemy combatants – which is certainly fewer than the 120,000 Japanese Americans who were detained – Congress has not explicitly authorized their detentions and the Supreme Court has been remarkably silent and deferential to the executive branch. It will be interesting to see how the Supreme Court ultimately rules in *al-Marri* – the only active enemy combatant case involving a U.S. person, which, as of this writing, is pending an evidentiary hearing if not an interlocutory appeal to the Supreme Court. If there is not another terrorist attack rivaling 9/11 at the time of the Supreme Court’s ruling in *al-Marri*, it is likely the Supreme Court will find unconstitutional the President’s claim of inherent war powers to detain U.S. persons arrested in civilian areas as enemy combatants when the civilian courts are functioning and when there has been no congressional suspension of the writ.

In sum, it is unlikely that the Administration’s enemy combatant policy will prove constitutional and “pursuant to an Act of Congress” if the Supreme Court decides on the issues presented in *Padilla* and *al-Marri*. Nonetheless, despite the legal obstacles, there seems to be legal authority to create a narrow regime for preventive detention based on national security interests as long as some due process rights are afforded the suspects *and* as long as it is pursuant to an “Act of Congress.” In fact, the war power cases demonstrate that the most significant factor in increasing the chance of any preventive detention regime being found lawful is congressional involvement. As *Ex parte Milligan*, *Ex parte Quirin*, *Ex parte Endo*, and *Youngstown* show, the Supreme Court is more likely to find preventive detention constitutional under the President’s war powers if Congress legislates on the matter. Furthermore, explicit congressional legislation (unlike the vague AUMF) would obviate any statutory concerns posed by the Non-Detention Act.

Before proposing an alternative preventive detention regime that complies with the aforementioned legal principles, it is helpful to look at how Israel and Britain have dealt with preventive detention with respect to their terrorist threats. Both Israel and Britain have provided considerable more due process rights to their detainees than the current enemy combatant policy even though they probably face a greater ongoing terrorist threat than does the United States.

V. INSIGHT FROM ISRAEL AND BRITAIN'S PREVENTIVE DETENTION REGIMES

No civilized nation confronting serious danger has ever relied exclusively on criminal convictions for past offenses. Every country has introduced, by one means or another, a system of preventive or administrative detention for persons who are thought to be dangerous but who might not be convictable under the conventional criminal law.

-Alan Dershowitz³⁷⁹

A. INTRODUCTION

Israel and Britain have been dealing with terrorist threats for decades, and both countries have created various regimes of preventive detention of terrorist suspects to deal with the recurring reality of terrorism. While no one terrorist attack in either country resulted in 3,000 deaths, as did the 9/11 attack, both countries view terrorism as threats to national security and both countries grapple with the balance between security and liberty in their counterterrorism policies. Hence, in understanding the broader context of America's enemy combatant policy, and analyzing whether preventive detention is needed in the war against terror, it is useful to look at other democracies that have dealt with asymmetric terrorist threats and observe how they have handled incapacitation and interrogation of terrorist suspects. As New York University Law Professor Schulhofer notes: "Fighting terrorism poses challenges that are essentially new (or newly recognized) for America. For that reason, it is worth considering the experience of Western democracies that confronted grave terrorist threats over extended periods before September 11, 2001."³⁸⁰ To this end, he posits that Britain and Israel "offer two of the few available sources of recent experience in attempting to reconcile the demands of national survival and the rule of law in the context of an unremitting terrorist threat."³⁸¹

³⁷⁹ Taylor, "Rights, Liberties, and Security: Recalibrating the Balance after September 11."

³⁸⁰ Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1908.

³⁸¹ Ibid.

As this chapter illustrates, there are significant differences among the preventive detention regimes of Israel and Britain and America's enemy combatant policy, namely: (1) the manner in which the preventive detention policies were created in the first place, and (2) the ensuing substantive rights of the detainees. While America's enemy combatant policy was created unilaterally by executive fiat based on claimed inherent constitutional authority, Israel and Britain's preventive detention policies – which have changed throughout the decades – have virtually always been enacted by a legislative body and were not just executive usurpations of power. Moreover, both Israel and Britain have almost always had an explicit role for judicial review before subjecting the suspect to prolonged preventive incapacitation whereas President Bush has asserted that the executive branch can alone resolve factual disputes and determine whether an individual is an enemy combatant based on intelligence reports without any opportunity for the detainee to respond. Finally, and most significantly, the breadth and scope of Israel and the Britain's current preventive detention policies are strikingly more modest than America's. Although Britain is currently trying to increase pre-charge detention to forty-two days (and in July 2005 tried to increase pre-charge detention to ninety days), its current limit is twenty-eight days of preventive detention. While Israel has administratively detained some Palestinians for years, the detainees were allowed judicial review, generally within eight days, and are subject to renewals every six months. Conversely, President Bush has asserted his right to unilaterally label individuals as enemy combatants and detain them *indefinitely* and incommunicado for a war that may never end. Professor Thomas Powers notes: "The policies of Britain and Israel each moved in the same direction: toward greater legal clarity and toward more extensive due process protections. The United States should take advantage of those countries' experiences to find ways to build due process into preventive detention."³⁸²

Although America's system of government and demographics are different than Israel and Britain's (and these differences will be addressed below), there are nonetheless useful comparisons that can be drawn between all three countries because they all are

³⁸² Powers, "WHEN TO HOLD 'EM, The U.S. Should Detain Suspected Terrorists—Even if it Can't Make a Case Against Them in Court."

democracies dealing with terrorism and they all struggle with balancing civil liberties with national security. Yet, America's policy of preventive detention is not just different by a matter of degree – it is grossly different by a matter of kind. An important question that needs to be addressed is to what extent, if any, is the threat America faces from terrorism graver than the threat faced by Israel, which is surrounded by hostile nations and has been in a state of emergency since its founding in 1948, or the threat faced by Britain, which has a larger home-grown Islamic terrorism threat than America. If the threat that America faces is similar or not as severe, then the rationale for its more draconian preventive detention policies loses even more of its persuasiveness.

B. ISRAEL'S PREVENTIVE DETENTION POLICIES

In Israel, preventive detention is called “administrative detention” and is distinct from criminal detention. Administrative detention is defined as detention without charges or trial and is authorized by administrative order rather than by judicial decree.³⁸³ It can be used solely for prevention.³⁸⁴ According to Haifa University Law Professor Emanuel Gross, administrative detention is based on the danger to state or public security posed by a particular person whose release would likely threaten the security of the state and the ordinary course of life.³⁸⁵ The goals of administrative detention are not arrest, trial, conviction, and punishment but rather prevention. Although difficulty in convicting a person in ordinary criminal proceedings is not a reason for employing administrative detention, if evidence is classified and cannot be disclosed, administrative detention becomes an option.³⁸⁶

³⁸³ B'Tselem, “Administrative Detention in Occupied Territories,” www.btselem.org/english/Administrative_Detention/Index.asp (accessed March 28, 2008).

³⁸⁴ Yigal Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era,” *NYU Journal of International Law and Politics*, 38 (November 2006): 73.

³⁸⁵ Emanuel Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?” *Arizona Journal of International and Comparative Law*, 18, no. 3 (2001): 752.

³⁸⁶ *Ibid.*, 757.

Significantly, Israel has *separate* administrative detention policies for Israel proper versus the Palestinian Territories, much like America's enemy combatant policy as applied to U.S. persons (Hamdi, al-Marri, and Padilla) who were/are detained in America versus aliens captured overseas and held at Guantanamo Bay or Bagram airbase in Afghanistan. While Israel's detention laws provide for judicial review and considerably more due process for its detainees than America's enemy combatant policy, Israel's administrative detention policies nonetheless invoke criticism from civil rights groups within Israel.

1. Israel Proper

In 1948, when Israel achieved its independence, Israel adopted the British Mandate's Defense (Emergency) Regulations of 1945, which empowered the High Commissioner and Military Commander to detain any person it deemed necessary for maintaining public order or securing public safety or state security. In 1979, Israel reformed its detention laws and enacted a new statute: the Emergency Powers (Detentions) Law of 1979 (EPDL of 1979), which provided more rights to detainees than the prior regulations, such as requiring that a detainee be brought before the president of the district court within forty-eight hours after arrest for judicial review of the detention, allowing appeals to the Supreme Court, and mandating periodic reviews by the president of the district court every three months.³⁸⁷ While the EPDL of 1979 only applies once a state of emergency has been proclaimed by the Israeli Knesset, Israel has been in such a state of emergency since its inception in 1948.

Under the EPDL of 1979, Israeli citizens and non-citizens within Israel can be detained if the defense minister has "reasonable cause to believe that reasons of state security or public security" requires it, although "state security" and "public security" have never been expressly defined.³⁸⁸ The district court in reviewing the detention order must vacate the order if it does not find "objective reasons of state security or public

³⁸⁷ *Emergency Powers (Detention) Law (EPDL)*, 5739-1979, S.H. 76, 33 L.S.I. 89-92, §§ 4(a)-7(a), 5 (Isr. 1979).

³⁸⁸ Gross, "Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?" 725.

security” that require the detention or if the detention “was made in bad faith or from irrelevant considerations.”³⁸⁹ A detainee may appeal the district court’s decision directly to the Israeli Supreme Court, which requires that the danger to the State must be “*so grave* as to leave no choice but to hold the suspect in administrative detention” or that the detainee “would *almost certainly* pose a danger to public or State security.”³⁹⁰ Unlike America where an enemy combatant can be held indefinitely, the detention order in Israel is limited to six months, although it can be indefinitely renewed.³⁹¹ Hence, this six-month distinction may be more form than substance. Matti Friedman of the *Jerusalem Post* notes that “in theory, someone could be held *ad infinitum*” under Israel’s administrative detention policies and in practice some Palestinians have been held for years in administrative detention.³⁹²

During the detention proceedings, the judge sees all the evidence, even if it is classified, and the judge decides what evidence may be disclosed to the detainee and his/her counsel.³⁹³ Therefore, some detainees are held without knowledge of the specific allegations against them and without a meaningful opportunity to rebut the charges.³⁹⁴ Such a practice has caused B’Tselem, an Israeli human rights group, to decry that “Israel has therefore made a charade out of the entire system of procedural safeguards in both domestic and international law regarding the right to liberty and due process.”³⁹⁵ It further argues that Israel has used administrative detention to detain Palestinians for their political opinions and non-violent political activity.³⁹⁶

³⁸⁹ EPDL, § 4(c).

³⁹⁰ Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?,” 763. (Emphasis in original).

³⁹¹ EPDL, § 2(b).

³⁹² Matti Friedman, “Not an Alternative to Criminal Justice,” *Jerusalem Post*, November 14, 2005.

³⁹³ EPDL, §§ 8(a) and 6(c).

³⁹⁴ Friedman, “Not an Alternative to Criminal Justice.”

³⁹⁵ B’Tselem, “Administrative Detention in Occupied Territories,” www.btselem.org/english/Administrative_Detention/Index.asp (accessed March 28, 2008).

³⁹⁶ Ibid.

Similar to some of the rationales for America's enemy combatant policy discussed in Chapter III, one rationale for Israel's administrative detention is to protect sources and methods and allow otherwise inadmissible evidence such as hearsay into evidence.³⁹⁷ Prolonged incapacitation for purposes of interrogation, however, does not seem to be a primary rationale in Israel, which stands in stark contrast to America's principal rationale for its enemy combatant policy. Unlike America (at least so far), Israel has also detained terrorists under administrative detention who have completed their criminal sentences if there is a fear they might engage in subsequent terrorists activities against Israel.³⁹⁸ Such a rationale B'Tselem argues means that Israel has totally blurred the "distinction between preventive and punitive detention."³⁹⁹

2. Palestinian Territories

In the West Bank and Gaza Strip, administrative detentions are generally enforced pursuant to various military orders. The military orders allow a senior military commander to detain an individual for up to six months, although it can be indefinitely renewed as in Israel proper, if the commander has "reasonable grounds to presume that the security of the area or public security require the detention."⁴⁰⁰ As in Israel proper, the terms "security of the area" and "public security" are not defined and their respective interpretations have been left to the military commanders.⁴⁰¹ The detainees are allowed to appeal the military orders to the Israeli Supreme Court, which sits in these cases as a High Court of Justice. As the High Court of Justice, the Court may hear "matters in which it deems it necessary to grant relief for the sake of justice."⁴⁰²

³⁹⁷ Gross, "Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?" 762.

³⁹⁸ Gross, "Democracy in the War against Terrorism – the Israeli Experience," 1193.

³⁹⁹ B'Tselem, "Administrative Detention in Occupied Territories."

⁴⁰⁰ B'Tselem, "Legal basis for Administrative Detention," www.btselem.org/english/Administrative_Detention/Index.asp (accessed March 28, 2008).

⁴⁰¹ Ibid.

⁴⁰² *Basic Law: Judicature of 1984*, § 15(c).

Unlike America's detainees at Guantanamo Bay who receive *no* access to a lawyer for their initial status determination or review hearings⁴⁰³ (which only occur once a year), a detainee in the Palestinian Territories *is* entitled to a lawyer, and an appearance before a judge is generally required within *eight* days of arrest (by comparison to forty-eight hours in Israel proper).⁴⁰⁴ Throughout the decades, however, different military orders have changed the number of days a detainee can be held without seeing an attorney and the number of days before judicial review. For instance, in 1970, Military Order 378 allowed military authorities to impede access to counsel for thirty days for individuals suspected of violating security laws.⁴⁰⁵ Specifically, Order 378 allowed the head of the investigation to bar access to a lawyer for fifteen days, and a reviewing administrator could extend the bar for an additional fifteen days if convinced that the measure was "necessary for the security of the area or for the benefit of the investigation."⁴⁰⁶ In 2002, a military order gave the commanding officer the authority to prevent a detainee from meeting with a lawyer for up to thirty-four days if the officer believed that such a meeting with the lawyer would impede the effectiveness of the interrogation.⁴⁰⁷ The Israeli Supreme Court upheld this provision finding that, on balance, the risk of damage to the investigation or national security outweighed the immediate right to an attorney.⁴⁰⁸ The detention, however, was not incommunicado; after forty-eight hours, the detainees had the right to be visited by the International Red Cross (IRC) and their families were informed of their whereabouts.⁴⁰⁹ By contrast, in

⁴⁰³ While the detainees are allowed a non-legal personal representative, the attorney client privilege does not apply.

⁴⁰⁴ B'Tselem, "The Legal Basis for Administrative Detention," http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp (accessed July 8, 2008).

⁴⁰⁵ Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1921-22.

⁴⁰⁶ *Ibid.*, 1922, n. 63.

⁴⁰⁷ Mersel, "Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era," 84.

⁴⁰⁸ *Marab v. IDF Commander in the West Bank*, 57 (2) P.D. 349, ¶¶ 39, 45 (Isr. H.C.J. 2003).

⁴⁰⁹ Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1923, citing *Marab*, ¶ 46.

America, the Bush Administration barred al-Marri from seeing his attorneys or the IRC until after he had been in incommunicado detention for sixteen months.⁴¹⁰

Israel uses administrative detention more aggressively against Palestinians than against Israeli citizens. According to Amnesty International, between 2000 and 2005, thousands of Palestinians were held in administrative detention, some of them for more than three years, while during that same time period only four Israelis were placed in administrative detention for periods ranging from six weeks to six months.⁴¹¹ Israel's use of administrative detention has also increased since the second intifada. Before the start of the first intifada in 1987, Israel had about 200 administrative detainees.⁴¹² According to B'Tselem, by 2007, Israel held a monthly average of 830 Palestinians in administration detention, which was one hundred higher than in 2006.⁴¹³ As of February 2008, Israel is holding 780 Palestinians in administration detention⁴¹⁴ (at its height, Guantanamo Bay held about 750 prisoners).⁴¹⁵ By comparison, over the years, only nine Israeli citizens residing in settlements in the West Bank have been administratively detained for periods up to six months.⁴¹⁶ Similarly, in America, most of its enemy combatants are held overseas and there appear to have been only three enemy combatants that were U.S. persons.

Although Israel's administrative detention regimes in both the territories and Israel proper provide more due process and substantive rights to its detainees than America's enemy combatant policy, many civil libertarians in Israel deride administrative

⁴¹⁰ Reply Brief of Appellants, *al-Marri v. Wright*, No. 06-7427, *9 (filed January 17, 2007) (available on Westlaw at 2007 WL 261569).

⁴¹¹ Amnesty International, "Israel/Occupied Territories: Administrative detention cannot replace proper administration of justice," *News Service No. 219*, August 2005, <http://asiapacific.amnesty.org/library/Index/ENGMDDE150forty-five2005?openandof=ENG-ISR> (accessed April 25, 2008).

⁴¹² Judge Amnon Straschnov, "Israel's Commitment to Domestic and International Law in Times of War," *Jerusalem Center for Public Affairs*, 4, no. 5 (October 2004), <http://www.jcpa.org/brief/brief4-5.htm> (accessed April 25, 2008).

⁴¹³ B'Tselem, "Administrative Detention in Occupied Territories."

⁴¹⁴ B'Tselem, "Statistics on Administrative Detention," www.btselem.org/english/Administrative_Detention/Statistics.asp (accessed March 28, 2008).

⁴¹⁵ Jackie Northam, "Q and A about Guantanamo Bay and the Detainees."

⁴¹⁶ B'Tselem, "Statistics on Administrative Detention."

detention as inhumane and undemocratic. Hebrew University Law Professor David Kretzmer argues that the main problem with administrative detention is the “temptation to use it even when it’s not necessary.”⁴¹⁷ He argues that it is overused in the territories instead of employing the criminal justice system and that Israel fails to recognize the “distinction between legitimate political activity and unlawful conduct that endangers security.”⁴¹⁸

3. Role of Israel’s Judiciary

Unlike America where the Supreme Court has been largely (but not entirely) deferential to the executive branch on matters of preventive detention (see Chapter IV), the Israeli Supreme Court since the 1900s has been extremely activist and attentive to due process and human rights issues raised by administrative detention. In fact, the Knesset (Israel’s legislature) has often criticized the activist nature of the Israeli Supreme Court arguing that it oversteps its bounds and second guesses the will of the people as expressed by their elected representatives.

Israel has been in a state of war since its founding in 1948 – with frequent uprisings in the West Bank and Gaza Strip. Moreover, terrorist organizations such as Hamas, the Popular Front for the Liberation of Palestine, and the Palestinian Islamic Jihad have directly targeted Israeli civilians, largely with suicidal attacks in Israeli cities. Terrorism against Israel increased dramatically after the second intifida, beginning in September 2000 and continuing to this day. According to Israel’s Ministry of Foreign Affairs, 960 Israeli citizens have been killed by terrorists between 2000 and 2006 and 6,596 have been wounded.⁴¹⁹ In 2002 alone, there were 60 separate suicide attacks against Israeli targets⁴²⁰ – more than during the previous eight years combined.⁴²¹ Yet,

⁴¹⁷ Friedman, “Not an Alternative to Criminal Justice.”

⁴¹⁸ Ibid.

⁴¹⁹ Israel Ministry of Foreign Affairs, “Victims of Palestinian Violence and Terrorism since September 2000,” <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm> (accessed April 25, 2008).

⁴²⁰ Ibid.

⁴²¹ Hoffman, *Inside Terrorism*, 153.

as Professor Schulhofer notes, although the Palestinian intifada has grown in intensity since 1999, “Israeli courts have become increasingly interventionist” and not increasingly deferential to military authorities.⁴²² Harvard Professor Philip Heymann expresses a similar sentiment: “The contrast with Israel is revealing. Even in the midst of the intifada, the Israeli Supreme Court has asserted some level of judicial review over government actions that affect Palestinians, both within Israel and also within the West Bank and Gaza.”⁴²³

For instance, in 2002, the Israeli Defense Forces (IDF) undertook a military operation known as Defensive Shield (or Defensive Wall) in response to an extremely bloody month of terrorist attacks in Israel which culminated in a suicide bomber killing dozens of Israelis during a Passover dinner at a hotel. As a result, IDF arrested thousands of Palestinians and, pursuant to a new military order,⁴²⁴ detained them for eighteen days (and then twelve days) without judicial review based on an IDF officer’s determination that the “circumstances of [the person’s] detention raise the suspicion that he endangers or may be a danger to the security of the area, the IDF, or the public.”⁴²⁵ In *Marab v. IDF Commander in the West Bank*, the Israeli Supreme Court invalidated the military order that allowed investigative detention of Palestinians in the West Bank for twelve days without a judicial hearing for purposes of interrogation.⁴²⁶ Rejecting the government’s claim that effective interrogation and security merited the delay, the Court held that prompt judicial review of detention is an inherent part of the legality of the detention measure because the detainee is still presumed innocent.⁴²⁷ The Court found that detaining Palestinians twelve days without judicial review was “in conflict with the fundamentals of both international and Israeli law,” which view “judicial review of

⁴²² Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1918.

⁴²³ Heymann, *Terrorism, Freedom and Security, Winning Without War*, 95-96.

⁴²⁴ Israel Defense Force, *Order Number 1504: Detentions in Time of Warfare (Temporary Order)*, Amend. 2, (June 4, 2002).

⁴²⁵ Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1922-23, citing *Marab*, ¶ 3.

⁴²⁶ *Marab*, ¶ 6.

⁴²⁷ *Ibid.*, ¶¶ 26-27, 36.

detention proceedings essential for the protection of individual liberty.”⁴²⁸ Significantly – and in stark contrast to America – the Israeli Supreme Court ruled that even “an ‘unlawful combatant’ . . . is to be brought *promptly* before a judge.”⁴²⁹ The Israeli Supreme Court, however, deferred its ruling for six months to allow the IDF to create a new regime of detention and arrest.⁴³⁰ Israel went back to allowing eight days before judicial review.

Interestingly, while the Israeli Supreme Court in *Marab* did not allow twelve days before judicial review, it did allow the IDF to postpone access to counsel for up to *thirty-four* days, meaning that some detainees would attend their judicial review hearing without the benefit of counsel. The Court based this determination on “significant security considerations.”⁴³¹ Importantly, the Court explicitly noted that “advancing the investigation [i.e., facilitating interrogation] is not a sufficient reason to prevent the meeting [T]here must be an element of necessity.”⁴³² This, of course, stands in stark contrast to America where the main rationale for years of incommunicado detention is to facilitate interrogation without interference posed by attorneys.

While the Israeli Supreme Court does not hesitate to involve itself in the minutia of administrative detention (i.e., discussing the exact number of days before judicial review and access to counsel), the U.S. Supreme Court by contrast has largely avoided the substantive details concerning preventive detention and focused more on narrow jurisdictional issues. For instance, in *Rasul v. Bush*, the U.S. Supreme Court held that the foreign nationals (similar to Israel’s detainees in the Palestinian Territories) held at Guantanamo Bay had a right to challenge their detentions in federal court with a writ of habeas corpus.⁴³³ Yet, the Court failed to provide *any* details on what proceedings, if any, would be appropriate. Therefore, there was no discussion of the time limits for

⁴²⁸ *Marab*, ¶¶ 32-36.

⁴²⁹ *Ibid.*, ¶¶ 26, 27. (Emphasis added).

⁴³⁰ *Ibid.*, 49.

⁴³¹ *Ibid.*, ¶ 45.

⁴³² Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1930 citing *Marab* ¶ 45 (internal quotations and citations omitted).

⁴³³ *Rasul v. Bush*, 542 U.S. 466 (2004).

incommunicado detention or judicial review and no discussion of what standards merited preventive detention in the first place. After *Rasul*, at the Bush Administration's urging, Congress passed the Detainee Treatment Act (DTA) of 2005,⁴³⁴ which stripped the foreign nationals at Guantanamo Bay of their limited victory in *Rasul* and held that the federal courts did not have jurisdiction to hear habeas appeals challenging their detention.

In June 2006, however, in *Hamdan v. Rumsfeld*, the Supreme Court interpreted the DTA restrictively, holding that it only applied *prospectively* from the date of enactment and did not remove jurisdiction from the federal courts in habeas proceedings pending on that date.⁴³⁵ Congress responded by passing the Military Commissions Act (MCA) of 2006 which stated, *inter alia*, that the DTA applied to all pending cases – not just those that occurred prospectively.⁴³⁶ On June 12, 2008, the Supreme Court held 5-4 in *Boumediene v. Bush* that the foreign nationals at Guantanamo have a right to challenge their detentions in U.S. civilian courts and that the MCA is unconstitutional to the extent that it precludes the jurisdiction of federal courts to entertain habeas petitions brought by them.⁴³⁷ As explained in Chapter IV, however, these cases do not concern the substantive rights detainees have on the merits and what claims will be cognizable before federal courts. In fact, ironically, after six years of litigation, the aliens at Guantanamo have the same rights – or lack thereof – that Padilla, Hamdi, and al-Marri have: they all can bring habeas petitions before federal courts. As commentator George Will notes of *Boumediene*, “None [of the detainees] will be released by the court’s decision, which does not even guarantee a right to a hearing. Rather, it guarantees only a right to request a hearing.”⁴³⁸ In other words, while the Israeli Supreme Court has intervened and

⁴³⁴ *Detainee Treatment Act of 2005*, Public law 109-148, *U.S. Statutes at Large* 119 (2005): 2680.

⁴³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴³⁶ *Military Commissions Act of 2006*, Public law 109-366, *U.S. Statutes at Large* 120 (2006): 2600.

⁴³⁷ *Boumediene*, slip op at 64.

⁴³⁸ George F. Will, “Contempt of Courts, McCain’s Posturing on Guantanamo,” *Washington Post*, A17, June 17, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/16/AR2008061602041.html> (accessed June 17, 2008). (Emphasis in original).

addressed substantive details of preventive detention (i.e., arguing that twelve days is too long before judicial review), the U.S. Supreme Court – six years later – is still standing on the sidelines.

The same pattern has occurred with the enemy combatant cases involving U.S. persons detained in America. As explained in Chapter IV, in *Hamdi*, the U.S. Supreme Court merely held that after two years of incommunicado detention as an enemy combatant, Hamdi must be allowed a meaningful opportunity to challenge the designation of an enemy combatant in a neutral forum (something Israel's 1979 law had already provided after a mere *forty-eight* hours for detainees arrested within Israel). Disappointingly, as in *Rasul*, *Hamdi* did not specify how long an enemy combatant could be held incommunicado or how long he could be held before being brought for judicial review. As Professor Schulhofer laments, the Supreme Court “expressed no impatience and showed no evident discomfort with the two-year-plus periods that detentions had been allowed to remain unreviewed.”⁴³⁹ Similarly, in *Padilla*, the U.S. Supreme Court rejected Padilla's appeal on jurisdictional grounds – finding 5-4 that Padilla filed his habeas petition in the wrong jurisdiction – and did not reach any of the substantive issues concerning his indefinite and incommunicado detention. As Professor Schulhofer observes, “[a]fter more than two years of detention, virtually all of it incommunicado, and after persistent, unsuccessful efforts to secure the rights to counsel and to a hearing on the allegations against him, Padilla obtained no relief whatsoever. He was told to start again in another court.”⁴⁴⁰ In sum, the Supreme Court in Israel is exceedingly more proactive in scrutinizing the details of administrative detention to guarantee basic human rights while the U.S. Supreme Court is much more reticent and deferential to the executive branch.

Some of these differences between the Israeli and U.S. Supreme Courts can be attributed to their divergent views on standing and justiciability. While in America the Supreme Court tends to be deferential to the executive branch during times of war, in Israel, which has been in a perpetual state of war, the Israeli Supreme Court believes that

⁴³⁹ Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1906.

⁴⁴⁰ *Ibid.*, 1912.

it can review virtually all activities conducted by the executive branch whether in Israel proper or the Palestinian Territories. In fact, there is almost no standing requirement for the Israeli Supreme Court – almost any person directly affected by state action can petition the Court that the action was unlawful, although the Court will not substitute its own discretion for the executive’s decisions on operational issues or counter-terrorism measures.⁴⁴¹ In fact, even organizations interested in the fate of a detainee can appeal to the Israeli Supreme Court.⁴⁴² As Israeli Supreme Court Registrar Yigal Mersel notes: “The approach of the [Israeli] Court is to balance human rights and national security on a case-by-case basis; this approach manifests itself in an almost total willingness to hear any case challenging any counter-terrorism activity, without reservations of standing or justiciability.”⁴⁴³ According to Chief Justice Barak, “everything is justiciable.”⁴⁴⁴ In other words, if a petitioner argues that the military is acting unlawfully, the petition will not normally be rejected on the grounds that the petitioner is not an Israeli citizen or inhabitant.⁴⁴⁵

Conversely, the U.S. Supreme Court has strict standing and jurisdictional requirements as demonstrated by the years of litigation just concerning whether the detainees at Guantanamo Bay could bring habeas petitions challenging their detentions in federal court. A fundamental difference between the Israeli and U.S. Supreme Courts is that the U.S. Supreme Court is restricted to ruling on specific cases that have been previously adjudicated and hence cannot opine on broader policy issues as can the Israeli Supreme Court. Given the U.S. Supreme Court’s greater standing and jurisdictional restrictions, it could be argued that Congress needs to take the initiative to protect the procedural and substantive rights of detainees more than does the Supreme Court. Stated

⁴⁴¹ Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era,” 106.

⁴⁴² Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1923, citing *Marab*, ¶ 46.

⁴⁴³ Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era,” 110.

⁴⁴⁴ Gross, “Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?” 758.

⁴⁴⁵ Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era,” 95.

differently, while the Israeli Supreme Court is activist (much to the chagrin of the Knesset) and often protects substantive human rights, the U.S.'s differing system of government leads to the conclusion that Congress needs to play this role.

4. Israel's 2002 Unlawful Combatants Act

In 2000, the Israeli Supreme Court held that the EPDL of 1979 did not allow Israel to detain individuals who are not themselves terrorist threats for “bargaining chips.”⁴⁴⁶ The Court held that the particular terrorist had to pose a risk and could not be held simply as a negotiating tool despite the fact that his detention might be crucial to state security and the release of Israeli soldiers. Rather, the Court found that an individual's detention had to ensue from the dangers posed by his release.⁴⁴⁷

As a result of this decision, the Knesset enacted the 2002 Incarceration of Unlawful Combatants Law, which allows Israel to detain “members of a force perpetrating hostile acts against Israel” even *without* a showing of immediate threat or *individual* involvement in terrorist acts.⁴⁴⁸ Although this law provides for access of counsel within seven days of detention, judicial review within fourteen days of detention, and a right of appeal to the Supreme Court within thirty days,⁴⁴⁹ this law would theoretically allow Israel to detain terrorist members based on mere association. The detainee can be held until the Minister of Defense determines that the group with which the detainee is associated has ceased hostilities against Israel or until a court determines that the detainee's release would not threaten state security.⁴⁵⁰ Significantly, if the Minister of Defense determines in writing that a force engages in hostile acts, this finding is presumed correct unless the detainee can prove otherwise.⁴⁵¹ After the initial detention hearing, the detention must be reviewed by the district court every six months (in contrast

⁴⁴⁶ *Anonymous Persons v. Minister of Defense*, 54(1) P.D. 721 (Isr. 2000).

⁴⁴⁷ Mersel, “Judicial Review of Counter-terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era,” 74.

⁴⁴⁸ *Incarceration of Unlawful Combatants Law*, 5762-2002, §§ 2 and 3(a) (Isr. 2002).

⁴⁴⁹ *Ibid.*, §§ 5 and 6(a).

⁴⁵⁰ *Ibid.*, §§ 3, 8.

⁴⁵¹ *Ibid.*, § 8.

to every three months under the 1979 law).⁴⁵² It appears that Israel has used this law only a few times, against high-profile terrorists from abroad. Most recently, Israel used it to detain Hezbollah fighters during the summer of 2006.⁴⁵³

By comparison, in 2005, Rep. Adam Schiff (D-CA) introduced the Detention of Enemy Combatant Act (DECA) (HR 1076) to the House of Representatives but it never became law.⁴⁵⁴ The purpose of DECA was to “authorize the President to detain an enemy combatant who is a United States person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda, to guarantee timely access to judicial review to challenge the basis for a detention, to permit the detainee access to counsel, and for other purposes.”⁴⁵⁵ Significantly, the DECA explicitly stated that “Congress has a responsibility for maintaining vigorous oversight of detention of United States citizens and lawful residents to assure that such detentions are consistent with due process.”⁴⁵⁶ Furthermore, in order to detain an “enemy combatant” under DECA, the President would need to certify that (1) “the United States Armed Forces are engaged in a state of armed conflict with al Qaeda and an investigation with a view toward prosecution, a prosecution, or a post-trial proceeding in the case of such person or resident is ongoing or (2) detention is warranted in order to prevent such person or resident from aiding persons attempting to commit terrorist acts against the United States.”⁴⁵⁷ Importantly, like Israel, the certifications would be effective for 180 days but able to be renewed with successive certifications.⁴⁵⁸ Judicial review would occur at the United States District Court for the District of Columbia where detainees could challenge

⁴⁵² *Incarceration of Unlawful Combatants Law*, 5762-2002, § 5(c).

⁴⁵³ Dvorah Chen, “Prosecuting Terrorists: A Look at the Israeli and American Experiences,” *The Washington Institute for Near East Policy*, Policy Watch # 1162, November 14, 2006, <http://www.washingtoninstitute.org/templateC05.php?CID=2531> (accessed April 28, 2008).

⁴⁵⁴ GovTrack.us. H.R. 1076--109th Congress (2005): *Detention of Enemy Combatants Act (DECA)*, <http://www.govtrack.us/congress/bill.xpd?bill=h109-1076> (accessed April 26, 2008). DECA was also proposed in 2002 and 2003 but it died in committee.

⁴⁵⁵ *Detention of Enemy Combatants Act (DECA)*, H.R. 1076, 109th Cong., 2005.

⁴⁵⁶ *Ibid.*, §2(16).

⁴⁵⁷ *Ibid.*, §5(a)(1).

⁴⁵⁸ *Ibid.*, §5(a)(2).

– with the assistance of counsel – the basis of the detention.⁴⁵⁹ Yet, DECA did not proscribe any particular time frame that a detainee could be held incommunicado or otherwise brought for judicial review, instead relying on vague generalities about future rules that shall “guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel.”⁴⁶⁰ Significantly, had DECA been enacted, it would have been similar to Israel’s law that passed in 2002, although Israel’s Act did specifically provide strict time frames for judicial review and access to counsel.

Yet, because DECA was *not* passed into law – and no alternative legislation has been enacted – the executive branch still argues it retains the right to unilaterally label a U.S. person caught in a civilian area as an enemy combatant and hold that person indefinitely, although pursuant to *Hamdi* that individual must be allowed to challenge that designation in a neutral forum. On the other hand, Israel’s 2002 Incarceration of Unlawful Combatants Law effectively allows Israel to “take hostages” to secure the release of Israeli prisoners. Thus, an argument could be made that such a rationale is more draconian than the U.S. enemy combatant policy where at least the enemy combatants are themselves (alleged) unsavory characters. Neither policy is refreshing.

5. Summary of Analysis: Israel versus United States

While’s Israel administrative detention that is used primarily against Palestinians has several problems, namely, that secret evidence can be used to detain individuals for indefinite renewals of six months, it is fundamentally better than America’s form of preventive detention employed in its enemy combatant policy. Although Israel has not suffered a catastrophic terrorist attack on the scale of 9/11, between 2000 and 2006, Israel suffered 152 attacks in a country with a population of close to seven million.⁴⁶¹ Unlike America, however, it has always allowed judicial review of its administrative detention of individuals and allowed access to counsel. Although the number of days has changed

⁴⁵⁹ DECA, H.R. 1076, §5(b).

⁴⁶⁰ Ibid., § 4.

⁴⁶¹ Israel Ministry of Foreign Affairs, “Victims of Palestinian Violence and Terrorism since September 2000”

throughout the decades, the maximum number of days a detainee can be held without access to counsel in Israel is thirty-four days and the maximum number of days before judicial review is eight days compared to America's indefinite and largely incommunicado detention. While pursuant to *Hamdi*, America's enemy combatants must now be given a meaningful opportunity to challenge the designation presumably with counsel, the details of that review and how long the person can be initially held without judicial review and access to counsel are still unresolved. As Heymann observes, "[t]hough our danger is far less than the danger that Israel faces, our willingness to abandon the most fundamental judicial protections of personal security has been far greater."⁴⁶²

Significantly, the rationales for preventive detention are also different between the two countries. While both countries attest they need preventive detention when evidence is classified or inadmissible – or when they do not want to compromise methods and sources – America further asserts that it needs preventive detention to gain actionable intelligence from the detainees, and that access to counsel will thwart that purpose. By contrast, Israel's Supreme Court refused to allow incommunicado detention for a mere thirty-four days based on such a rationale. Israel, however, uses administrative detention to continue to detain individuals that are dangerous to Israel's security after the completion of their criminal sentences. America has not yet articulated this rationale but it may be too soon to tell since all of America's convicted terrorists are still serving their sentences such as Padilla, Richard Reid, and John Walker Lindh.

Finally, Israel has never claimed that its executive branch or military could unilaterally create a system of administrative detention without input from the legislative or judicial branches. In fact, even at the height of suicidal terrorist attacks in 2002, the IDF only authorized detention of eighteen days (then dropped it to twelve days) without judicial review (which was struck down by the Israeli Supreme Court). It is telling that Israel's military only *tried* to obtain preventive detention for *weeks* compared to President Bush's claim of *indefinite* detention without judicial review.

⁴⁶² Heymann, *Terrorism, Freedom and Security, Winning Without War*, 96.

Although Israel's administrative detention policies highlight some substantial flaws in America's system of preventive detention, it is also useful to look at how Britain has dealt with its various terrorism threats throughout the decades. As will be shown, while Israel and America view the conflict with terrorism more as a "war" using terms such as "unlawful" or "enemy" combatants, Britain treats terrorists more as criminals, and its preventive detention regime reflects a need for additional time to investigate potential terrorist acts as crimes.

C. BRITAIN'S PREVENTIVE DETENTION POLICIES

In Britain, preventive detention is presently called "pre-charge detention" and is used to increase the time for investigation of a potential crime before charging the suspect. Unlike the Israeli model, pre-charge detention in Britain cannot be used to detain an individual after completion of a criminal sentence because he/she is a threat to security, and unlike the practice in the United States, pre-charge detention does not appear to be used solely for interrogation to gain useful intelligence, although this can be part of the rationale. Britain's form of preventive detention is really in support of its criminal justice system. There is no argument that terrorists are unlawful or enemy combatants and no discussion of how to create a regime outside of criminal law. As a British government committee noted in April 2002: "Terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism."⁴⁶³

1. Britain's Emergency Executive Powers

While Britain's current preventive detention regime is framed as pre-charge detention under its criminal justice system, this was not always the case. During both World Wars, Britain used virtually unchecked executive power to detain individuals suspected of being spies or otherwise hostile to the nation. Regulation 14B, enacted in 1915, allowed the Home Secretary (responsible for internal affairs in Britain and Wales)

⁴⁶³ Privy Counselor Review Committee, *Anti-Terrorism, Crime and Security Act of 2001 Review: Report*, 8 quoted in Donohue, "Britain's Counterterrorism Policy," 39.

to order the internment of any person “for securing the public safety or the defense of the realm.”⁴⁶⁴ Detainees could not use habeas corpus to challenge the detentions in court; rather, a government committee could recommend, but not order, release. The House of Lords ruled that it was “necessary in a time of great public danger to entrust great powers to [the executive]” and assumed that “such powers will be reasonably exercised.”⁴⁶⁵ Similar powers were enacted during World War II with Regulation 18B, under which 2,000 individuals were detained without trial.⁴⁶⁶ Many were British citizens, including leaders of right-wing fascist organizations. Although Winston Churchill initially supported Regulation 18B during World War II, he ultimately condemned it, and it was abolished after the war. He stated: “The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist.”⁴⁶⁷

Emergency executive power to detain generally ended after World War II. Britain then promulgated a series of emergency regulations that were constantly renewed to deal with the threat posed by Irish Republicans and later al Qaeda.⁴⁶⁸ Instead of unfettered executive detention, the focus changed to pre-charge detention periods (the current maximum is twenty-eight days) with judicial review at varying intervals. While America also detained individuals during World War II (e.g., Japanese internment camps), Britain’s Regulations 14B and 18B during the World Wars seem similar to President’s Bush *current* claim of executive war powers to unilaterally detain terrorist suspects as enemy combatants. In other words, although Britain faced a serious terrorist threat with its conflict in Northern Ireland (between 1966 and 1999 a total of 3,636

⁴⁶⁴ Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1935.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid., 1936.

⁴⁶⁸ Until 1972, Britain retained emergency powers in Northern Ireland to detain suspects for 28 days to complete an investigation or 72 hours on suspicion that the detainee had or was about to commit a crime. Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1936-37.

individuals lost their lives in violence related to the Northern Ireland conflict),⁴⁶⁹ it did not resort to executive detentions as it had during the World Wars but instead issued a series of regulations that, while controversial, at least allowed for judicial review of pre-charge detention. Similar to Israel, as the terrorist threat increased, it could be argued that the Britain responded overall with more due process for terrorist suspects.

2. Britain's Emergency Regulations Pre 9/11

While a detailed recounting of Britain's conflict with Northern Ireland and its ensuing legal instruments to fight terrorism before 9/11 is beyond the scope of this chapter, with respect to pre-charge detention, there are some useful regulations to discuss. The 1939 Prevention of Violence (Temporary Provisions) Act (PVA) empowered the Home Secretary to arrest and detain individuals without warrant for an initial period of forty-eight hours and, with the authorization from the Secretary of State, for an additional period of five days, making the total number seven days for pre-charge detention.⁴⁷⁰ The PVA was supposed to be temporary and only last two years; however, it was not until 1952 that it was allowed to expire and not until 1973 that it was formally repealed.⁴⁷¹ Yet, in 1974, after IRA bombings of two pubs in Birmingham left 21 people dead and 160 injured, the PVA was reintroduced again in 1974 as the Prevention of Terrorism (Temporary Provisions) Act of 1974 (PTA).⁴⁷² Section 12 (1b) of the PTA allowed the British police to arrest and detain anyone they reasonably suspected "to be or have been involved in acts of terrorism" for seven days without charge with the approval of the Secretary of State. For the first forty-eight hours, the suspects could be held without access to attorneys.⁴⁷³ Under general criminal law, by comparison, pre-charge detention could not and presently cannot exceed ninety-six hours (four days) and the suspect is

⁴⁶⁹ Donohue, "Britain's Counterterrorism Policy," 18-19.

⁴⁷⁰ *Ibid.*, 20.

⁴⁷¹ Laura Donohue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," *BCSIA Discussion Paper 2000-05, ESDP Discussion Paper ESDP-2000-01*, John F. Kennedy School of Government, Harvard University, August 2000, 5.

⁴⁷² *Ibid.*

⁴⁷³ Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1939.

entitled to see an attorney within the first thirty-six hours.⁴⁷⁴ It is interesting to note that, when faced with a serious terrorist threat, Britain increased incommunicado detention a mere twelve hours (from thirty-six hours to forty-eight hours) while incommunicado detention has been *over two years* for America's enemy combatants with no prescribed statutory limit at all.

The PTA was rewritten in 1976, 1984 and again in 1989 but continued to stay as emergency "temporary" powers that had to be renewed each year until the 2000 Terrorism Act, discussed below. The seven days of pre-change detention stayed the same throughout the PTA's existence. From 1974 until 1996, 27,000 people were arrested under the PTA alone. Although fewer than fifteen percent were subsequently charged with a crime, according to terrorism expert and Professor Linda Donahue, the information gained during questioning most likely decreased the level of violence.⁴⁷⁵

In 1972, as the conflict and violence in Northern Ireland escalated, the British government appointed Lord Diplock to head an inquiry into needed emergency powers to deal with the growing terrorist threat in Northern Ireland. The resulting 1973 Northern Ireland (Emergency Provisions) Act (EPA) empowered the government to intern terrorist suspects for seventy-two hours without charges based on mere subjective suspicion (reasonableness was not even required). In 1987, these special arrest powers for Northern Ireland were suspended and instead the PTA provision requiring "reasonable grounds" before detainment was employed.⁴⁷⁶ While the EPA (like the PTA) was supposed to be temporary, it lasted twenty-six years until the 2000 Terrorism Act (discussed below).⁴⁷⁷ Although Britain had a tendency to enact restrictive legislation under the guise of being "emergency" legislation, the laws were continued because they proved effective.⁴⁷⁸ Donahue points out, however, that the effectiveness of security had

⁴⁷⁴ *Police and Criminal Evidence Act*, 1984 § 25(1) (Eng.).

⁴⁷⁵ Donahue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," 7.

⁴⁷⁶ Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1937.

⁴⁷⁷ Donahue, "Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom," 5.

⁴⁷⁸ *Ibid.*, 7.

a corresponding negative effect on civil liberties, including increased friction within Northern Ireland and unwelcome international attention on British domestic affairs.⁴⁷⁹

After the peace process with Northern Ireland in 1999, Britain began to focus more on international terrorism, including al Qaeda.⁴⁸⁰ In 2000, Britain passed permanent counterterrorism legislation (no more discussions of “temporary” measures) with the 2000 Terrorism Act (TA). While originally the TA only allowed seven days for pre-charge detention, it was amended in 2003 to increase the total possible period of detention without charge to fourteen days for any individual reasonably suspected of being a terrorist.⁴⁸¹ Between the date of the amendment and September 4, 2005, 357 people were arrested of whom thirty-six were held in excess of seven days.⁴⁸² In other words, although the police had the ability to hold suspects for fourteen days in pre-charge detention, it exercised that power infrequently.

3. Britain’s Regulations Post 9/11

Like Israel and America, Britain proposed different preventive detention or pre-charge detention policies for its citizens compared to aliens residing within its borders. While Britain has never held an individual outside its borders as the United States has at Guantanamo Bay or Israel has in the Palestinian Territories, Britain’s preventive detention policy towards its foreign nationals after 9/11 was more draconian than the procedures applied to its own citizens, causing much uproar and the policy’s eventual demise.

⁴⁷⁹ Donohue, “Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom,” 40.

⁴⁸⁰ Donohue, “Britain’s Counterterrorism Policy,” 18.

⁴⁸¹ *Terrorism Act 2000*, Schedule 8, ¶ 36(3A), inserted by the Criminal Justice Act of 2003 § 306(1)(4).

⁴⁸² House of Commons Home Affairs Committee, Terrorism Detention Powers, *Fourth Report of Session 2005-06*, 1, July 3, 2006, ¶ 133.

a. Foreign Nationals in Britain

After 9/11, Britain adopted additional legal measures with the 2001 Anti-terrorism, Crime, and Security Act (ATCSA) which provided stronger powers to allow the police to investigate and prevent terrorist activity and other serious crime. Sixty-seven British citizens died in the 9/11 attacks, and eleven of the nineteen suspected 9/11 hijackers had British links.⁴⁸³ The attack highlighted that terrorist organizations were using Britain to plan attacks.⁴⁸⁴

While the ATCSA did not increase pre-charge detention for British citizens from the 2000 TA's seven days – that happened later in 2003 and again after the July 2005 bombings – it did allow for the removal or indefinite detention of foreign nationals suspected of terrorist activity (albeit this part of ATCSA was limited to fifteen months, unless renewed by Parliament).⁴⁸⁵ Upon certification by the Home Secretary that the individual was an international terrorist whose presence in Britain created a risk to national security, that individual could be deported. If deportation could not occur because of Britain's international obligation to prevent torture or other inhumane treatment, or because of national security concerns, then ATCSA provided the individual could be indefinitely detained – without trial – in Britain, unless the suspect agreed to go to another country and the country agreed to accept him.⁴⁸⁶

Yet, ATCSA did provide some measure of review: a person detained or deported could appeal – with the assistance of counsel – the certification to the Special Immigration Appeals Commission (SIAC), which had the power to cancel the certification if it concluded there were not grounds for the Home Secretary's certification.⁴⁸⁷ Significantly, the appeal included two stages: an “open” one where the Home Secretary disclosed information and a “closed” one where classified information

⁴⁸³ Donohue, “Britain's Counterterrorism Policy,” 22.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

was made available to a security-cleared special advocate.⁴⁸⁸ Once receiving classified information, the special advocate was precluded from further communication with the suspect or his attorney. Unlike in Israel where a judge could prohibit both the suspect and his attorney from seeing classified information during the judicial proceeding for administrative detention, British law allows for a special advocate to access the information against the suspect and provide some measure of review.

Nonetheless, ATCSA's provisions regarding indefinite detention of foreign nationals did not survive scrutiny. The government ultimately repealed the provisions of ATCSA dealing with indefinite detention based on a House of Lords Judicial Committee December 2004 ruling that such powers were incompatible with articles of the European Commission on Human Rights relating to the right to liberty and the right to freedom from discrimination. The Committee found the indefinite detention powers to be discriminatory as they only applied to foreign nationals, not to British citizens, and that they were not proportionate to the threat Britain faced from terrorism.⁴⁸⁹

During the relatively short-life of ATCSA, Britain held seventeen foreign nationals, some more than two years.⁴⁹⁰ Of the seventeen, two men voluntarily left Britain and one individual was released under ATCSA and detained on other grounds.⁴⁹¹ In October 2003, the SIAC rejected appeals of ten of the remaining fourteen detainees.⁴⁹² In other words, while the indefinite detention of foreign nationals under ATCSA was short-lived, it does not appear that the SIAC rejected many of the detentions on substantive grounds. Yet, even the indefinite detention provision of ATCSA – which was controversial and only lasted approximately three years – provided at the outset for some level of judicial review of the indefinite detention of foreign nationals.

⁴⁸⁸ Donohue, "Britain's Counterterrorism Policy," 22.

⁴⁸⁹ Home Office, *Anti-terrorism, Crime and Security Act of 2001* <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/anti-terrorism-crime-security-ac/> (accessed April 28, 2008).

⁴⁹⁰ Donohue, "Britain's Counterterrorism Policy," 24.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

By contrast, the United States did not provide any review of the foreign nationals held at Guantanamo Bay until after the Supreme Court ruled in *Hamdi* and *Rasul* that enemy combatants must be allowed to challenge the designation in a neutral forum. As a result, the Bush Administration created Combatant Status Review Tribunals (CSRTs) where a three-panel board of military officers from the Department of Defense (not the judiciary) decides the detainees' status based on the current threat assessment and intelligence value of each detainee. The detainees are not allowed attorneys; they cannot see evidence used that is considered classified; and there is a rebuttable presumption in favor of the government.

For aliens detained *within* the United States, the USA Patriot Act allowed detention by the Attorney General without charge for seven days, after which the person needed to either be charged or removal proceedings commenced.⁴⁹³ If a detainee could not be otherwise deported and the "release of the alien was found to threaten the national security of the United States or the safety of the community or any person" the Attorney General could hold the individual for renewable periods of six months.⁴⁹⁴ According to the Inspector General of the Department of Justice, 762 aliens were arrested in connection with investigating 9/11 and the majority of these individuals were charged with immigration violations (such as overstaying visas).⁴⁹⁵ Ironically, foreign nationals under the USA Patriot Act have more due process rights than U.S. persons detained as enemy combatants. After all, the Administration detained Padilla as an enemy combatant for three and one-half years before bringing criminal charges, which seems to be in contrast to Britain and Israel where non-citizens are (or were in the case of Britain) treated in a harsher manner.

b. British Citizens

After terrorist bombs murdered fifty-two people in London on July 7, 2005, the Home Office (similar in some respects to the U.S. Department of Homeland

⁴⁹³ *USA Patriot Act of 2001*, U.S. Code 8, § 1226(a) (5).

⁴⁹⁴ *Ibid.*, § (6).

⁴⁹⁵ Rosenzweig and Carafano, "Preventive Detention and Actionable Intelligence," 5.

Security) tried to increase pre-charge detention for British citizens from the fourteen days provided in the TA of 2000, as amended in 2003, to ninety days. Then-Prime Minister Tony Blair addressed Parliament by stating: “I have to try to do my best to protect people in this country and to make sure their safety and their civil liberty to life come first. Let us have a debate about the strength or otherwise of those proposals but for myself I find it a convincing case.”⁴⁹⁶ Although Parliament refused to extend pre-charge detention to ninety days in what was Mr. Blair’s first parliamentary defeat, it is significant to note that Mr. Blair presented his recommendation to Parliament and encouraged debate about the issue. This, of course, contrasts to President Bush’s unilateral decisions – without any debate or input from Congress – on the identity of enemy combatants and how long they can be held without access to counsel.

On July 3, 2006, the House of Commons Home Affairs Committee⁴⁹⁷ published a report entitled *Terrorism Detention Powers, Fourth Report of Session 2005-06*, which evaluated whether there was a legitimate justification to extend pre-charge detention to ninety days. The report articulated reasons to extend pre-charge detention beyond fourteen days: the international nature of terrorism; difficulties in establishing the identity of terrorist suspects; the need to find interpreters; the need to decrypt computer files; the length of time needed for scene examination and analysis; the length of time needed to obtain and analyze data from mobile phones; the need to allow for religious observance by detainees; and delays arising from solicitors’ consultations with multiple clients.⁴⁹⁸ Significantly, unlike in America, interrogation to gain intelligence was not one of the rationales listed as a justification for extending preventive detention, although certainly the detainees are allowed to be questioned during the pre-charge detention period. Yet, the report notes that “[i]n general it cannot be expected that interviews of suspects during extended detention will lead to significant additional information that can

⁴⁹⁶ Privacy International, “UK Introduces another Terrorism Bill for Unprecedented Powers,” (December 10, 2005), [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-388487](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-388487) (accessed April 28, 2008).

⁴⁹⁷ The Home Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Home Office and its associated public bodies.

⁴⁹⁸ House of Commons Home Affairs Committee, *Terrorism Detention Powers, Fourth Report of Session 2005-06*, July 3, 2006, 1.

be used in court.”⁴⁹⁹ According to the police, “the detention process is not about interviewing alone as many people do not answer questions in any event” and that “in the majority of suspect interviews, terrorist suspects are advised, and exercise, their right to remain silent.”⁵⁰⁰ By comparison, in America, enemy combatants are not allowed to meet with attorneys expressly because it would interfere with interrogation and questioning of terrorist suspects. The report concluded that ninety days of pre-charge detention may be useful in some cases but that it was not essential.⁵⁰¹

While ninety days of pre-charge detention did not pass, as a compromise, in the Terrorism Act of 2006, twenty-eight days for pre-charge detention became the new limit.⁵⁰² According to the TA of 2006, those arrested can be detained for forty-eight hours, after which the police or Crown Prosecution Service may apply to a judicial authority for an extension of the detention warrant.⁵⁰³ In other words, judicial review begins after forty-eight hours. Detention can only be authorized if it is necessary to (1) obtain relevant evidence by questioning the suspect; (2) preserve evidence or (3) to make a decision about the deportation or charging of the suspect.⁵⁰⁴ Applications to extend the detention period may be made for seven days at successive intervals up to a maximum of twenty-eight days.⁵⁰⁵ For the first fourteen days, the application for detention is made to a designated magistrate judge. Between days fourteen and twenty-eight, the application must be made to a High Court judge.⁵⁰⁶ At each proceeding, the detainee can be represented by special counsel who has been cleared to handle classified information.⁵⁰⁷ This judicial review at week-long intervals stands in stark contrast to the Bush Administration’s claim of inherent constitutional authority to detain enemy combatants

⁴⁹⁹ House of Commons Home Affairs Committee, *Terrorism Detention Powers*, ¶ 90.

⁵⁰⁰ *Ibid.*, ¶ 87.

⁵⁰¹ *Ibid.*, ¶ 36 in conclusions.

⁵⁰² *Terrorism Act 2000* (TA), Schedule 8, ¶ 36(3)(b)(ii) as amended by *Terrorism Act 2006*, S. 23.

⁵⁰³ TA, S. 41(3).

⁵⁰⁴ TA, Schedule 8, ¶ 23.

⁵⁰⁵ *Ibid.*, ¶ 29(3).

⁵⁰⁶ *Ibid.*

⁵⁰⁷ TA, Schedule 8, ¶ 28.

indefinitely and without access to counsel. Finally, in Britain, the Home Secretary appoints an independent reviewer to examine the operation of the detention laws and to review each individual case of detention.⁵⁰⁸ Significantly, there is no such equivalent review function in the United States for its enemy combatants.

According to the Home Office, the judicial review proceedings have been rigorous, with applications for detentions being strenuously contested by the defense attorneys and lasting several hours. Not all detention orders have been granted and some have been granted for less time than requested.⁵⁰⁹ Since July 26, 2006, when pre-charge detention was increased to twenty-eight days, and October 2007, there were 204 arrests under the TA. Only eleven suspects were detained for more than fourteen days (eight of them were charged and three were released without charge).⁵¹⁰ In other words, although Britain can detain suspects up to twenty-eight days, it appears to be using its authority sparingly.

During the summer of 2007, the Home Office tried to increase the twenty-eight day limit to fifty-six days of pre-charge detention. A government report issued by the Home Office in July 2007 argued that the police were investigating around 2,000 individuals of terrorist related offenses and that the complexity of the investigations was escalating due to an increase in use of false identities and international links which necessitated the cooperation of foreign governments.⁵¹¹ The report concluded:

The Government is clear that it will only be necessary to go beyond twenty-eight days in exceptional circumstances – where there are multiple plots, or links with multiple countries, or exceptional levels of complexity. To ensure that any new limit is indeed used only in exceptional cases, we believe that any increase in the limit should be balanced by strengthening the accompanying judicial oversight and Parliamentary accountability.⁵¹²

⁵⁰⁸ Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 8.

⁵⁰⁹ Home Office, “Options for Pre-Charge Detention in Terrorist Cases,” July 25, 2007, 6.

⁵¹⁰ Jago Russell, “Terrorism Pre-Charge Detention Comparative Law Study,” *Liberty* (November 2007): 17, citing Oral Evidence to Home Affairs Select Committee, October 19, 2007, Q 7 (Mr. Peter Clarke CVO OBE QPM),

⁵¹¹ Home Office, “Options for Pre-Charge Detention in Terrorist Cases,” 2-3.

⁵¹² *Ibid.*, 9.

Although the Home Office proposed four options to implement the extension to fifty-six days of pre-charge detention – with each option offering different varieties of judicial review and oversight – Parliament refused to extend pre-charge detention beyond twenty-eight days. Alternatively, the Home Office proposed civil emergency legislation that would allow for an additional thirty days’ detention (for a total of fifty-eight days) if Parliament declared an emergency.⁵¹³ This option was also defeated by Parliament.

By comparison, in America, Congress has utterly failed to involve itself in the details of preventive detention for U.S. persons, although it has passed the Detainee Treatment Act of 2005 and Military Commissions Act of 2006 to deal with the foreign nationals at Guantanamo Bay. As explored earlier, while Congress did debate the DECA in 2005, which would have provided a statute to deal with preventive detention of U.S. persons as enemy combatants, it failed to pass and it does not appear that any alternatives are being proposed. In other words, while Britain and Israel’s respective legislatures have played an active role in their respective preventive detention regimes (whether called pre-charge detention or administration detention), Congress has been remarkably silent and deferential to the executive branch.

Currently, the British government is trying to increase the twenty-eight day pre-charge limit to forty-two days. In April 2008, Home Secretary Jacqui Smith introduced a new anti-terrorism package that would allow for pre-charge detention of up to forty-two days and post-charge questioning of terrorist suspects.⁵¹⁴ According to Smith, forty-two days would only be used in exceptional cases such as those that require the cooperation of a foreign government.⁵¹⁵ In June 2008, the House of Commons passed the measure by an extremely narrow margin, vote was 315 to 306, but it is not likely to pass the House of Lords when it comes up for debate in the Fall.⁵¹⁶

⁵¹³ “UK: Extended Pre-Charge Detention Violates Rights,” *Human Rights Watch*, July 26, 2007, <http://hrw.org/english/docs/2007/07/26/uk16491.htm> (accessed April 26, 2008).

⁵¹⁴ “Critics Slam New UK Anti-Terrorism Plan,” *CNN*, January 25, 2008, <http://www.cnn.com/2008/WORLD/europe/01/25/britain.terror/index.html> (accessed April 26, 2008).

⁵¹⁵ *Ibid.*

⁵¹⁶ John Burns, “Vote Favors Terrorism Bill and Premier in Britain,” *New York Times*, June 12, 2008, A6.

Although forty-two days of pre-charge detention is not nearly as severe as years of incommunicado and indefinite detention as advocated by the Bush Administration, the forty-two day proposal has sparked harsh criticism from civil liberties group within Britain. For instance, civil rights group Liberty has called the proposal unjust, arguing that “[t]he UK already has the longest period of pre-charge detention in the Western world, and there is no evidence that a further extension will make us any safer.”⁵¹⁷ Human Rights Watch has argued that the government could enact “rolling periods of 42-day pre-charge detention” by proposing new charges against terrorist suspects.⁵¹⁸ According to Ben Ward, Associate Europe and Central Asia Director at Human Rights Watch, increasing the pre-charge detention period more than twenty-eight days “denies the basic right to liberty” and is counterproductive as it is “a recipe for alienating communities vital to defeating terrorism.” He explains that the proposals to increase pre-charge detention evoke the experience of internment in Northern Ireland: “Internment was deeply counterproductive in the fight against terrorism in Northern Ireland, and these proposals carry similar risks.”⁵¹⁹ Amnesty International also argues the extending pre-charge detention risks “alienat[ing] affected communities, leading people to mistrust the authorities and make them less likely to want to cooperate with the police.”⁵²⁰

Critics contend that other measures should be used before increasing pre-charge detention, such as allowing suspects to be interviewed after they have been charged (and allowing refusals to answer to be held against them) and using telephone intercept material as evidence.⁵²¹ Liberty Director Shami Chakrabarti maintains that she

⁵¹⁷ “Critics Slam New UK Anti-Terrorism Plan.”

⁵¹⁸ Ibid.

⁵¹⁹ “UK: Extended Pre-Charge Detention Violates Rights,” *Human Rights Watch*.

⁵²⁰ “UK: Extension of Pre-Charge Detention Amounts to Internment,” *Amnesty International*, July 25, 2007, <http://www.amnestyusa.org/document.php?lang=e&id=ENGEURforty-five0122007> (accessed April 26, 2008).

⁵²¹ Sally Gainsbury, “Anti-Terror Measures ‘Need 56-Day’ Detention Period,” *Public Finance*, July 27, 2007.

would support measures allowing for a suspect to be charged with a lesser offence, such as possessing explosive material or attending a terror camp, while investigations continued for more serious or related offences such as conspiracy to murder.⁵²²

Curiously, some critics of Britain's attempts to increase pre-charge detention beyond twenty-eight days argue that America compares *favorably* to Britain. In November 2007, Liberty published an article entitled *Terrorism Pre-Charge Detention Comparative Law Study*, in which it compares Britain's pre-charge detention to other countries, including America but not Israel. In this report, author Jago Russell argues that America only detains criminals for forty-eight hours under its criminal justice system while Britain's twenty-eight days is excessive:

Despite being a major terrorist target the United States, for example, allows only two days' of pre-charge detention. . . . How can our Government sustain the argument that the UK police need over a month when so many other countries manage with pre-charge detention periods of less than a week?⁵²³

In this war on terror, however, America has often *bypassed* its criminal justice system, arguing that terrorist suspects are enemy combatants that can be held incommunicado pursuant to the laws of war and released at the end of hostilities that may never end. While Russell acknowledges that America has detained individuals due to the executive's "war powers" privilege, he argues such powers are not equivalent to pre-charge detention in Britain as they are not part of the criminal justice system.⁵²⁴ Nevertheless, while Britain's twenty-eight days of pre-charge detention may be excessive, when it comes to preventive detention as a concept, it is hardly prudent to compare Britain's twenty-eight days of pre-charge detention, which was passed by Parliament and has weekly judicial review incorporated within its provisions, to America's enemy combatant policy where the executive branch has unilaterally decided to detain individuals for years of

⁵²² "Terrorist Detention 'Longest' in UK," *BBC News*, November 12, 2007, http://news.bbc.co.uk/2/hi/uk_news/politics/7090105.stm (accessed April 26, 2008).

⁵²³ Russell, "Terrorism Pre-Charge Detention Comparative Law Study," 13.

⁵²⁴ *Ibid.*, 19.

incommunicado detention. Russell notes: “If UK law is significantly more repressive than the law in other countries, some will use the disparity to question Britain’s moral authority.”⁵²⁵ Such a statement only applies *a fortiori* to the United States.

4. Summary of Analysis: Britain versus United States

Since 2000, Britain’s preventive detention regime has moved from seven days of pre-charge detention to twenty-eight days of pre-charge detention with access to counsel after forty-eight hours and judicial review every seven days. While there has been debate about extending pre-charge detention to ninety, fifty-six or currently now forty-two days, there never has been an argument that pre-charge detention should be indefinite and without access to counsel. In fact, on June 2, 2008, in arguing that Britain should extend pre-charge detention from twenty-eight to forty-two days, Prime Minister Gordon Brown specifically stated in *The Times* that “our first principle is that there should always be a maximum limit on pre-charge detention. It is fundamental to our civil liberties that no one should be held arbitrarily for an unspecified period.”⁵²⁶ In other words, unlike President Bush who has argued for indefinite detention of enemy combatants with no judicial review, the executive branch in Britain has never asserted such authority in the war on terror. Furthermore, Parliament has not abdicated its responsibilities to its citizens: it has and continues to openly debate the issue. There is no executive usurpation of power as there was during the World Wars.

By contrast, in the United States, Hamdi, Padilla and al-Marri – all U.S. persons – were locked up for years with no access to counsel. Al-Marri appears to be the only U.S. person currently detained as an enemy combatant, although he now has met with attorneys and, as of this writing, his case is pending an evidentiary hearing. Padilla was convicted of terrorism-related charges in August 2007 after serving over three years as an enemy combatant and is serving a seventeen year sentence, and Hamdi was released to Saudi Arabia in 2004 after the Supreme Court held that he must be provided a meaningful opportunity to rebut the designation as an enemy combatant. Yet, the

⁵²⁵ Russell, “Terrorism Pre-Charge Detention Comparative Law Study,” 7.

⁵²⁶ Gordon Brown, “42-Day Detention; A Fair Solution,” *The Times*, June 2, 2008.

precedent of unilateral executive war powers to detain American citizens as enemy combatants and hold them indefinitely is on the books. While the Supreme Court has ruled that enemy combatants must be allowed a modicum of judicial review to challenge the factual assertion that they are enemy combatants, there is no prescribed timeframe on when it must occur and no timeframe on how long an enemy combatant can be denied counsel for purposes of enhancing interrogation potential. Even the proposed DECA did not contain such particulars. These details are apparently not significant enough to motivate Congress to legislate or move the Supreme Court to provide more than minimal holdings in its decisions.

While approximately 3,000 people died on September 11, Britain like Israel has faced decades of terrorist threats. For the worst twenty years of the conflict in Northern Ireland, 2,750 individuals were killed, 2,000 of them civilians, and more than 31,900 seriously injured, all in a territory of 1.5 million.⁵²⁷ Furthermore, between 1976 and November 1998, 94 incidents of international terrorism took place in Britain, including the bomb planted on Pan Am Flight 103 that exploded over Lockerbie in 1988 killing 270 people.⁵²⁸ Moreover, al Qaeda killed 52 and injured 700 people in July 2005 by bombing public transportation in London, and in 2006, eight men tried to smuggle explosives in liquids onto airliners leaving Heathrow airport for the United States. Furthermore, it is well known that Britain has a substantial home-grown Islamic terrorist threat posed by its class system and radicalization of poor Muslims. As of June 2008, according to Prime Minister Brown, there are at least 2,000 terrorist suspects, 200 networks or cells, and 30 active plots in Britain.⁵²⁹ It is simply not a credible argument that America's harsher preventive detention policy is based on a larger threat posed by al Qaeda. As does Israel, Britain provides more due process and rights to its detainees than America, and the other branches of government do not appear to be so feeble. As Professor Schulhofer aptly notes: "In one important respect the British and Israeli experiences are unambiguous.

⁵²⁷ Schulhofer, "Checks and Balances in Wartime: American, British and Israeli Experiences," 1933.

⁵²⁸ "Legislation against Terrorism, a Consultation Paper," *Stationery Office*, (December 1998), <http://www.archive.official-documents.co.uk/document/cm41/4178/chap-02.htm> (accessed April 26, 2008).

⁵²⁹ Brown, "42-Day Detention; A Fair Solution."

They leave us with no illusion that the powers currently claimed by the U.S. government are in any sense *normal*, even for a situation of national crisis.”⁵³⁰

Malaysia and Singapore have preventive detention regimes in which they can hold suspects for two-year periods without charge or meaningful court appearances based on mere suspicion that they might endanger national security.⁵³¹ Considering the United States held Padilla as an enemy combatant for three and one-half years before charging him with a crime, and al-Marri has been held without charges since 2003, it seems like the United States is in the company of authoritarian regimes more than democracies such as Israel and Britain. As explained in Chapter II, it does not appear that the threat posed by terrorism merits such a sacrifice of our democratic principles.

D. CONCLUSION

The United States was completely unprepared on 9/11 and the resulting enemy combatant policy seems to be an ad hoc response to insecurity. In comparing other countries’ approaches to preventive detention, the question should not be how does the United States create a perfect regime – because that cannot happen – the question is how does the United States create a regime that can at least provide some meaningful judicial review, some access to counsel, some congressional oversight, and some balance to unilateral executive discretion. While Britain and Israel’s approaches to preventive detention are not perfect – and frequently lambasted by their own human rights groups – they do demonstrate that democracies facing serious and long-term terrorist threats can provide more overall due process and substantive rights to detainees than America’s years of incommunicado and indefinite executive detention. Israel and Britain had the advantage (if it can be called that) of decades of dealing with terrorism before 9/11. It only makes sense that the United States should look to their experiences to see if any of their principles can be applied to the United States’ unique kind of government.

⁵³⁰ Schulhofer, “Checks and Balances in Wartime: American, British and Israeli Experiences,” 1910. (Emphasis in original).

⁵³¹ Roth, “After Guantanamo, The Case against Preventive Detention.”

Historically both Britain and Israel's preventive detention policies started more draconian with less judicial review and more executive discretion. Over the years as each country became more accustomed to its "emergency," they provided more due process rights and judicial review to detainees even though the threat posed by terrorism did not diminish. Perhaps this is the United States' fate, and it too will eventually provide more due process rights to its enemy combatants by involving Congress and the judiciary in creating and monitoring a preventive detention regime. The purpose of this paper is to analyze options so the United States can move in that direction. Accordingly, Chapter VII proposes a regime for preventive detention enacted by Congress whereby the Foreign Intelligence Surveillance Court monitors a system of preventive detention that takes into account the lessons learned and observations gleaned from both Israel and Britain.

VI. METHODOLOGY FOR EVALUATING ALTERNATIVE REGIMES FOR PREVENTIVE DETENTION AS A TOOL IN THE WAR ON TERROR

This is the destiny of a democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome difficulties.

-Israeli Supreme Court⁵³²

As will be discussed in Chapter VII, many lawyers, professors, and policy-makers have advocated alternative regimes to the Bush Administration's enemy combatant policy for detaining suspected terrorists. The ideas proposed are: (1) enacting no preventive detention regime (i.e., "purist" approach); (2) creating entirely new court systems to deal not only with detaining suspected terrorists for purposes of interrogation and/or incapacitation but also with ultimately trying them for various war crimes or violations of criminal statutes; (3) making modifications to the current criminal justice system; (4) creating some sort of civil commitment scheme; (5) or creating an "emergency constitution" with provisions for preventive detention after another terrorist attack. Congress also attempted to pass the Detention of Enemy Combatant Act in 2005 but it stalled in committee and has never been resurrected. This paper proposes using the Foreign Intelligence Surveillance Courts to monitor a narrowly-prescribed regime for preventive detention.

In order to evaluate these alternative approaches against each other as well as against the status quo enemy combatant policy, it is helpful to identify a framework for assessing criteria that are important underpinnings of a democratic society. For purposes of this paper, each approach to preventive detention will be analyzed using four

⁵³² *Public Committee against Torture in Israel v. State of Israel*, 38 I.L.M. 1471, 1488 (Isr. H.C.J. 1999).

parameters, namely whether and to what extent the approach is likely to (1) be legal; (2) protect security; (3) enhance liberty; and (4) be efficient from an organizational/institutional standpoint.

As will be shown in the next chapter, there is generally an inverse relationship between security and liberty. In other words, approaches that favor or err on liberty tend to offer less protection to national security, although – as will be demonstrated – this is not universally the case. This “tradeoff” between liberty and security is what law professors Eric Posner and Adrian Vermeule dub the “security/liberty” frontier, which uses welfare economics to try to determine the “Pareto-optimal” solution.⁵³³ Although a formal analysis using Pareto-optimization is beyond the scope of the paper, it is useful to think of security and liberty as “goods” that a society – at any given point – tries to maximize. As they describe:

The tradeoff thesis can be stated in simple terms. Both security and liberty are valuable goods that contribute to individual well-being or welfare. Neither good can simply be maximized without regard to the other. The problem from the social point of view is to optimize: to choose the *joint* level of liberty and security that maximizes the aggregate welfare of the population.⁵³⁴

Hence, while this methodology will analyze “security” and “liberty” separately with respect to each of the options for preventive detention proposed, it will also look at their interplay. If liberty protections can be increased without any decrease in security, then the option is producing a suboptimal result. As will be shown, this is arguably the case with the current enemy combatant policy.

A. LEGALITY

Whether the approach is likely to be legal will be addressed first because if an approach is not likely to be legal, then it is an impractical solution to address preventive detention as a tool in the war on terror. Legality will be analyzed both from a

⁵³³ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 12, 21-22, 27.

⁵³⁴ *Ibid.*, 22. (Emphasis added).

constitutional and statutory standpoint. While a policy may currently be unlawful because it violates a statute, Congress could change the law to allow a certain policy, thereby making it legal.

B. SECURITY

As explained in detail in Chapter III, the main justifications for preventive detention as a tool in the war on terror – as least as articulated by the Bush Administration – are interrogation to gain actionable intelligence and general incapacitation to prevent the terrorist suspect from returning the battlefield. While these rationales are controversial, there is nonetheless evidence that intelligence obtained from the interrogation of enemy combatants has stopped specific terrorist plots, lead to the captures of additional terrorists, and allowed the U.S. to better understand the structure and capabilities of al Qaeda. Similarly, there is evidence that released enemy combatants have returned to the battlefield to inflict more damage. While critics of preventive detention argue that cooperating terrorists also provide useful information and that criminal charges can incapacitate dangerous individuals who intend to do future harm, as explored in Chapter III, these arguments are not foolproof and have several weaknesses, especially if there is not enough admissible evidence to convict a terrorist suspect beyond a reasonable doubt in a court of law. If the threat posed by terrorism merits preventive detention, then these two reasons, interrogation and incapacitation, appear to be the motivating rationales. In other words, they represent the “security” part of the methodology.

C. LIBERTY

The concept of “liberty” is somewhat amorphous. Two key ingredients – in the context of preventive detention – are due process and a meaningful ability for the terrorist suspect to challenge his need to be preventively detained. The more such protections resemble the current criminal justice system, which errs on the side of allowing a guilty person to go free over incapacitating an innocent, the more the preventive detention regime would be protecting liberty, probably at the expense of security. In order to help

gauge liberty to make meaningful comparisons between the different approaches to preventive detention, the following democratic principles will be employed: (1) transparency and accountability; (2) balance of power or checks and balances; and (3) narrow-tailoring of the government's policy to meet its objectives or not being overbroad. These three principles have been identified by Law Professor Stephen Schulhofer as "fundamental to the preservation of freedom" and "bedrock principles" of our democracy.⁵³⁵

With respect to transparency and accountability, the question is whether the preventive detention regime is cloaked in secrecy or whether there is some accountability or transparency allowed, perhaps to Congress, if not the American people. While it is understandable that parts of a preventive detention regime may need to be secret from the American public, especially if classified information is being used, the more a regime of preventive detention is overall accountable to Congress or the judiciary, the more it would uphold liberty principles. Again, as will be analyzed in the next chapter, there may very well be a tension between more openness and more security.

Separation of powers is another key ingredient of liberty and arguably one of the most ingenious foundations of the U.S.'s system of government.⁵³⁶ James Madison, one of the Founding Fathers, wrote in the *Federalist Papers* that "tyranny" results when there is an "accumulation of all powers, legislative, executive, and judiciary, in the same hands"⁵³⁷ In Louis Fisher's words: "The Framers rejected political models that concentrated power in a single branch, especially over matters of war. To minimize

⁵³⁵ Stephen Schulhofer, "No Checks, No Balances: Discarding Bedrock Constitutional Principles," in *The War on Our Freedoms*, eds. Richard Leone and Greg Anrig, Jr. (New York: Century Foundation, 2003), 76.

⁵³⁶ The concept of the separation of powers did not originate with the Founding Fathers. French political theorist Montesquieu also advocated separating and balancing powers between the executive, legislative, and judicial branches of government as a means of ensuring the freedom of the individual. In 1748, he wrote in *The Spirit of Laws*: "Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." Charles de Montesquieu, *The Spirit of Laws*, trans. Thomas Nugent (London: G Bell & Sons, Ltd., 1914), <http://www.constitution.org/cm/sol.htm> (accessed July 7, 2008).

⁵³⁷ James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, ed. Isaac Kramnick (New York: Penguin Books, 1987), 303.

abuse and injustice by government officials, they relied on a system of checks and balances, separation of powers, review by an independent judiciary, and the operation of republican principles.”⁵³⁸

Nonetheless, there are several renowned legal theorists who argue that power should be accumulated in the executive during times of emergencies. Most notably, Posner and Vermeule argue that courts and, to a lesser extent Congress, should be deferential to the executive branch during emergencies because the executive branch contains the requisite knowledge, is able to react quickly, and can, therefore, select the best policy.⁵³⁹ While they acknowledge that the executive may chose a suboptimal policy, they do not believe that the courts are likely to improve the matter so they should remain deferential:

On this comparative institutional view, there is no general reason to think that judges can do better than government at balancing security and liberty during emergencies. Constitutional rules do no good, and some harm, if they block government’s attempts to adjust the balance as threats wax and wane. When judges or academic commentators say that government has wrongly assessed the net benefits or costs of some security policy or other, they are *amateurs playing at security policy, and there is no reason to expect that courts can improve upon government’s emergency policies in any systematic way*.⁵⁴⁰

By contrast, Law Professor Cass Sunstein succinctly explains the problem inherent in solely relying on the executive branch to make fundamental decisions:

Dynamics within the executive branch present a serious problem, *because that branch is designed to be neither diverse nor deliberative*. It is run by a single person, who is constitutionally entitled to populate his branch with like-minded people. But modern social science has demonstrated that, after deliberation, like-minded people usually end up thinking a more extreme version of what they thought before they started to talk. This process is known as “*group polarization*.” Suppose that people within an

⁵³⁸ Fisher, “Detention and Military Trial of Suspected Terrorists,” 51. Louis Fisher is a specialist in constitutional law at the law library, Library of Congress.

⁵³⁹ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 29-31.

⁵⁴⁰ *Ibid.*, 31. (Emphasis added).

executive agency believe that Iraq has weapons of mass destruction. That belief is likely to be heightened after members have started to talk among themselves.⁵⁴¹

While there are differing opinions on the role of separation of powers during an emergency, this author accepts as true that an adherence to balance of powers principles enhances liberty. Journalist Jeff Rosen notes: “We may indeed need a system of preventive detention, but we also need the legislative and judicial oversight that exists in other Western democracies.”⁵⁴² Hence, each proposal for preventive detention will be measured in part on how well it incorporates separation of power principles into its regime. The greater the role for the judicial branch and Congress, the higher the proposal will score on this aspect of the liberty continuum.

Finally, the last component of liberty is the question of whether the approach is narrowly-tailored to meet its objectives. This parameter scrutinizes whether there is a good “fit” between the policy of preventive detention and objective of security. Because of the controversial nature of preventive detention, policies that are narrowly-tailored to deal exclusively with interrogation and incapacitation of terrorist suspects – without impacting ordinary criminal law – will score higher on liberty than policies that could gradually be broadened to encompass preventive detention of dangerous but non-terrorist threats.

In sum, liberty looks to measure how well any proposal for preventive detention incorporates (1) transparency/ accountability, (2) balance of power principles, and (3) being narrowly-tailored to meet its objectives.

D. ORGANIZATIONAL FEASIBILITY

The last parameter focuses on feasibility from an organizational/institutional standpoint and assesses whether an institution already exists that could be modified to create a preventive detention regime or whether new institutions would need to be

⁵⁴¹ Sunstein, “Monkey Wrench, The Supreme Court has always thwarted presidents who demand unlimited legal power in wartime.”

⁵⁴² Jeffrey Rosen, “Home Front: How to Detain Terrorists,” *The New Republic*, May 17, 2004.

created. While this factor does not look at financial costs per se, it more generally considers whether the hiring of new staff and judges would be needed and/or new facilities built, or whether using an institution that already exists would prove to be a more efficient use of resources.

E. CONCLUSION

Finally, this paper does not advocate any one approach for preventive detention that is applicable in *all* contexts. Rather, this paper attempts to categorize and evaluate the ideas advocated for preventive detention by comparing whether they are likely to be lawful, how they balance security and liberty, and whether they are likely to be organizationally efficient. The concept of preventive detention, especially for purposes of interrogation, is on many levels antithetical to democratic principles. Yet, as Posner and Vermeule attest, “evils, even grave ones” may be “necessary” in this war on terror and the absolutist must “come to grips with the inevitability of tragic choices.”⁵⁴³ In the end, Congress and the American people will need to decide whether preventive detention is needed as a tool in this conflict. If so, then this paper suggests an approach using the FISA courts that will try to balance the due process for detainees and enhance democratic principles to the greatest extent it can while also prioritizing national security.

⁵⁴³ Posner and Vermeule, *Terror in the Balance, Security, Liberty and the Courts*, 187.

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VII. BEYOND THE ENEMY COMBATANT POLICY: ALTERNATIVE APPROACHES FOR PREVENTIVE DETENTION IN THE WAR ON TERROR

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates . . . to be more safe [nations] at length become willing to run the risk of being less free.

-Alexander Hamilton from the *Federalist Papers*⁵⁴⁴

Individuals from across the political spectrum have criticized the Administration's enemy combatant policy and suggested alternative ways to create preventive detention regimes to deal with the terrorist threat. As succinctly summarized by journalists Wittes and Gitenstein of the Brookings Institution, "[t]he Bush Administration's insistence on deriving this scheme purely from the laws of war, without involving the other branches of government, has resulted in a confused, widely criticized, poorly justified, and sometimes unfair system for which Congress has so far needed to take no responsibility."⁵⁴⁵ While some proposals for preventive detention are mere implorations for Congress to become involved,⁵⁴⁶ other ideas provide more substantive details. In this chapter, President Bush's enemy combatant policy (i.e., the status quo) as well as the substantive alternatives to President Bush's enemy combatant policy are described, categorized, and analyzed under the methodology described in Chapter VI, including an idea proposed by this author to have the Foreign Intelligence Surveillance Court (FISC) monitor a system of preventive detention.

The alternative ideas can be classified into six general categories: (1) the purist approach, where there is no system of preventive detention and U.S. persons are tried in Article III courts with criminal charges or set free; (2) the creation of an entirely new

⁵⁴⁴ *The Federalist No. 8* quoted in Renwick and Treverton, "The Challenges of Trying Terrorists as Criminals," 1.

⁵⁴⁵ Wittes and Gitenstein, "A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights," 15.

⁵⁴⁶ See, e.g., Rosen, "Home Front: How to Detain Terrorists."

national security court to deal with detention and trials of suspected terrorists; (3) a middle ground of using the current criminal justice system with modifications to existing statutes (4) Bruce Ackerman's "emergency constitution" with provisions for preventive detention after another terrorist attack; (5) Congress's failed attempt to pass the Detention of Enemy Combatant Act (DECA) in 2005 (this was briefly explored in Chapter V); and (6) this author's approach of using the FISC to monitor a system of preventive detention for the limited purposes of incapacitation and interrogation but not for trials. While this author's recommendation of using the FISC technically falls under category 3 of modifying existing statutes (FISA would be modified to include the changes to the FISC), because it would constitute a substantial change to a statute, and create a fundamentally new regime for preventive detention, it is discussed separately.

A. THE ENEMY COMBATANT APPROACH

1. Description

President Bush's enemy combatant policy as applied to U.S. persons has been discussed in previous chapters and is not repeated in detail here. In sum, President Bush asserts that he has authority as Commander in Chief of the Armed Forces under Article II of the Constitution and the AUMF passed by Congress after 9/11 to unilaterally detain terrorist suspects indefinitely without charge and incommunicado for purposes of incapacitation and interrogation. It appears that, despite numerous threats, he has applied this policy to only three U.S. persons, Hamdi, Padilla, and al-Marri, although al-Marri is the only current U.S. person being detained as an enemy combatant. Padilla was transferred to the criminal justice system in 2005 after spending three and one-half years as an enemy combatant. He was convicted of terrorism-related charges in 2007 and sentenced to seventeen years in prison. Hamdi was released to Saudi Arabia in 2004 after the Supreme Court held that he had to be given a meaningful opportunity to challenge his designation as an enemy combatant in a neutral forum.

Although one could argue that the situation facing the foreign nationals detained at Guantanamo is a more pressing issue, and certainly many of the underlying principles

and solutions discussed herein are applicable to them, the fact that the President has decided he has the unilateral authority to detain U.S. persons captured in peaceful civilian areas as enemy combatants is especially troubling. As Professor Heymann argues, President Bush has failed to consider “the impact of precedent and practice on the character of the country and to deny the Congress and the courts that opportunity to exercise oversight.”⁵⁴⁷

2. Analysis

a. Lawfulness

As discussed in detail in Chapter IV, it is doubtful the enemy combatant policy is lawful. It most likely violates the Non-Detention Act of 1971, which requires Congress to pass a statute before individuals can be detained. While the plurality in *Hamdi* found that the AUMF passed by Congress after 9/11 provided the necessary statutory support to detain a U.S. citizen captured on an actual battlefield during the specific hostilities in Afghanistan, it is likely that the Supreme Court will not find the AUMF provides the necessary statutory authority to support the Administration’s broad approach to its enemy combatant policy for U.S. persons arrested in the United States and not on a battlefield. In fact, in *Rumsfeld v Padilla*, Justices Stevens, Breyer, Souter, and Ginsburg in their dissent would have found indefinite detention of a U.S. citizen captured in America for incommunicado detention **prohibited** under 18 U.S.C. § 4001(a) and **not** supported by the AUMF.⁵⁴⁸ Furthermore, Justice Scalia argued in his *Hamdi* dissent that the AUMF did not authorize detention of U.S. citizens as enemy combatants.⁵⁴⁹ In other words, as explained in Chapter IV, there are currently five Justices who would likely not find that the AUMF provides the requisite statutory support to support President Bush’s enemy combatant policy.

⁵⁴⁷ Heymann, *Terrorism, Freedom and Security, Winning Without War*, 90.

⁵⁴⁸ *Padilla*, 542 U.S. at 455 (Stevens, J., dissenting).

⁵⁴⁹ *Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting).

Although the Supreme Court in *Hamdi* did not address whether the President had unilateral authority under Article II of the Constitution to detain U.S. persons as enemy combatants (because it found that Congress had provided that authority with the AUMF), a review of war power cases suggests that the President probably does not have such unilateral authority without congressional consent. Because the legality of the enemy combatant policy is thoroughly discussed in Chapter IV, it is enough to say here that President Bush's broad application of his enemy combatant policy is legally flawed and not likely to survive Supreme Court scrutiny.

b. Security

If the executive branch can unilaterally detain any U.S. citizen in any American city as an enemy combatant, then security is arguably enhanced. After all, does anyone really doubt that Padilla or al-Marri are terrorists or dangerous individuals? Because there has not been another terrorist attack on American soil since 9/11, and because the Bush Administration insists that interrogation of enemy combatants has thwarted specific terrorist plots and lead to captures of countless other terrorists, one could argue that the enemy combatant policy has made the nation more secure.

Alternatively, one could argue that the enemy combatant policy – directly because it eschews liberty in favor of security – has tarnished America's reputation and created the impetus for more terrorists, although such an assertion would be difficult if not impossible to quantify. One could also argue that if the executive branch were detaining thousands of U.S. persons as enemy combatants, and many were truly innocent of terrorist activity, then the government would be wasting resources instead of focusing its energy on capturing genuine terrorists, thereby decreasing security.

Yet, upon scrutiny, as deplorable as the detention of 120,000 Japanese Americans was during World War II, did it really make the nation less safe? The United States currently incapacitates a higher percent of its population than any other nation in the world so we certainly have the infrastructure.⁵⁵⁰ While there are undoubtedly

⁵⁵⁰ "After Paris: Sentencing in America under Scrutiny," *NPR*, June 12, 2007, <http://www.npr.org/templates/story/story.php?storyId=10932951> (accessed June 29, 2008).

negative consequences to incarcerating innocent people, if one looks at security in *isolation*, one would have to conclude that the implications of the enemy combatant policy, whereby the executive can unilaterally detain terrorist suspects indefinitely for purposes of interrogation and incapacitation, enhances security. The more relevant and complicated question concerns the costs to liberty and whether incorporating more due process into the enemy combatant policy would really decrease security by any appreciable amount. In other words, the enemy combatant policy may be an inefficient and suboptimal policy choice because it *needlessly* prioritizes security at the expense of liberty.

c. Liberty

With respect to liberty, President Bush's enemy combatant entails no transparency, no accountability, and no balance of power. While, as explained in Chapter III, the Administration claims that it only designates a U.S. person as an enemy combatant if there is a consensus between executive branch agencies that it is warranted, the executive branch is staffed by like-minded people who often suffer from group-polarization. Having the FBI, CIA, DoD, and DoJ all decide that a person should be designated as an enemy combatant is not comforting when the judicial branch is completely bypassed. Louis Fisher observes: "No review panel within the executive branch, much less within the military, could possibly possess the sought-for qualities of neutrality, detachment, independence, and impartiality if it has to pass judgment on a President's decision that a U.S. citizen is an 'enemy combatant.'"⁵⁵¹

Furthermore, the enemy combatant policy is not narrowly-tailored to meet its objectives. Although it has only been applied a handful of times to U.S. persons, President Bush has asserted his ability to apply it anytime he feels it is necessary to protect this nation from terrorism. As Padilla's lawyer Jonathan Freiman notes, "[t]he argument that the entire United States has become a battlefield by virtue of those heinous attacks on 9/11 is just an argument to make the Constitution completely optional, an

⁵⁵¹ Louis Fisher, "Detention and Military Trial of Suspected Terrorists," 3.

argument to extend presidential power to the level of monarchy – to every inch of life in this country.”⁵⁵² In other words, as explained in Chapter II, the power that President Bush has asserted in this war on terror is overbroad.

While protecting this nation from terrorist attacks is a laudable, rational, and necessary goal, it seems that we should never be so concerned with security that we have absolutely no regard for liberty or incarcerating an innocent person. It seems some sort of balance is always preferable. The enemy combatant policy has no balance – it is an extreme policy that completely favors security over liberty. And, as explained in Chapter II, it is not clear that terrorism poses such a threat to this nation that merits such a draconian response. Law Professor Monica Hakima attests: “The armed-conflict model is consistent with the preventative goals of non-battlefield detention, but its *liberty costs are prohibitive*: innocents easily could be detained, for extended periods if not for life, based only on a reasonable suspicion of threat and without any judicial guarantees.”⁵⁵³ As Wittes and Gitenstein similarly observe, “[t]oo much factual uncertainty attends the status of individual detainees to permit their long-term detention based on procedures created solely by the executive branch and lacking in basic fairness to the accused, who may face a lifetime of incarceration.”⁵⁵⁴

Significantly, if one could provide more due process rights (i.e., more liberty), without decreasing security, then there is not a tradeoff between liberty and security, and the policy is inefficient. Would providing due process to Hamdi, Padilla or al-Marri really have resulted in less security? While pursuant to *Hamdi* there must be minimal judicial review – although this review can occur within the executive branch in the form of a “military tribunal” – the question is whether providing review within the judicial branch would really have resulted in less security to this nation. Unfortunately, there is no definitive or mathematical way to answer this question. The overriding point

⁵⁵² Richardson, “Is this Man a Monster?” 130.

⁵⁵³ Hakima, “International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide,” 395. (Emphasis added).

⁵⁵⁴ Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 3.

is that the enemy combatant policy does not appear to be the prudent choice for the United States in this war on terror because the risks to liberty (i.e., detaining an innocent person) are too high. It does not seem narrowly-tailored to meet its objectives.

d. Institutional Efficiency

The enemy combatant policy does, however, have low institutional/organizational costs. Once President Bush designates a U.S. person as an enemy combatant, he is then transferred to military custody. There is no need for a separate court system as discussed below. (This paper focuses on U.S. persons; there are obviously institutional costs to housing aliens at Guantanamo Bay or elsewhere.)

e. Conclusion

In sum, the enemy combatant policy is most likely unlawful, overbroad, cloaked in secrecy, and does not adhere to balance of power principles. Assuming it is found to be lawful, it is a poor policy choice in that it either (1) prioritizes security at the expense of liberty and is a bad tradeoff, or (2) it actually produces an inefficient result in that more liberty could be added without decreasing security. Either way, one should scrutinize alternative approaches to preventive detention to see where they lie on this balance between security and liberty and see if a better solution can be proposed to the next Administration.

It is recommended that the enemy combatant policy as applied to U.S. persons be ceased immediately. Al-Marri should be transferred to the criminal justice system, deported, or subjected to an alternative regime of preventive detention enacted by Congress. While President Bush's enemy combatant policy is probably unlawful and has numerous policy flaws as delineated above, an alternative regime of preventive detention can most likely be created that complies with constitutional and statutory law and upholds more democratic principles.

B. THE PURIST APPROACH

1. Description

As discussed in Chapter IV, Justice Scalia, joined by Justice Stevens, wrote a lengthy dissent in *Hamdi* arguing that there was no constitutional authority for the Administration's enemy combatant policy."⁵⁵⁵ Justice Scalia argued that the Administration had two choices for detaining citizens like Hamdi and presumably Padilla and al-Marri: (1) urge Congress to suspend the writ of habeas corpus or (2) try suspected terrorists on specific criminal charges in civilian courts. According to Justice Scalia, if the Administration considered the 9/11 attacks an "invasion" and asserted that it is currently responding to that "invasion," Congress could suspend the writ, which it has not done. Justice Scalia stated: "Absent suspension . . . the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."⁵⁵⁶ If the writ is not suspended, then Justice Scalia found that terrorism suspects must be charged with specific crimes or set free. In essence, the purist approach is *no* system of preventive detention as a tool in the war on terror.

Former federal prosecutor Kenneth Roth, who is now the Executive Director of Human Rights Watch, adopts this purist approach. According to Roth, there is no need for preventive detention as a tool in the war on terror. He argues that the "U.S. criminal justice system has successfully dealt with a broad range of serious security threats, from espionage at the height of the Cold War to ruthless drug-trafficking enterprises."⁵⁵⁷ As explained in Chapter III, Roth argues that statutes banning conspiracy and providing material support to terrorists can incapacitate terrorists at early stages. With respect to the need for interrogation, he maintains that the right to counsel would not prevent a "parallel but separate questioning aimed at investigating other suspects or preventing terrorism."⁵⁵⁸ He further asserts that statutes such as the Classified Information

⁵⁵⁵ *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting).

⁵⁵⁶ *Ibid.*, 554.

⁵⁵⁷ Roth, "After Guantanamo, The Case Against Preventive Detention."

⁵⁵⁸ *Ibid.*

Protection Act (CIPA) have successfully resulted in “a reasonable compromise between fairness and security.” In fact, he states that “CIPA rules have not forced the government to abandon even one of the dozens of international terrorism cases it has prosecuted since 9/11.” While he acknowledges that the criminal justice system is not perfect and the government may have to release some suspects, he nonetheless concludes that is an “infinitely better option than preventive detention.”⁵⁵⁹

Similarly, Kelly Anne Moore, former chief of the Violent Crimes and Terrorism Section in the Brooklyn U.S. Attorney’s Office, argues there is no need for preventive detention because “[t]he existing federal system has a proven track record of dealing with complex prosecutions.”⁵⁶⁰ In a 2005 terrorism prosecution of two Yemeni citizens who conspired to send money from Brooklyn to members of al Qaeda and Hamas, Moore explains that, while some of the government’s evidence was excluded, and certain classified material had to be de-classified before trial, the two terrorists were ultimately convicted. She also recounts how she had to win a motion to protect information related to the methods and operations of German law enforcement before critical German agents were permitted to testify in an American court. She concludes that “[t]he use of classified information to obtain convictions in terrorism cases does not need to be the extreme hurdle it is often made out to be.”⁵⁶¹

Finally, human rights attorneys Zabel and Benjamin argue in their white paper *In Pursuit of Justice, Prosecuting Terrorism Cases in Federal Court* that the criminal justice system has mechanisms in place for detaining terrorist suspects such as pre-trial detention and the material witness statute – hence, a scheme of administrative or preventive detention is not warranted for the rare anomalies of Padilla or al-Marri:

[W]e do not believe that the need for a brand-new scheme of administrative detention has been established. In the overwhelming majority of terrorism cases that have arisen to date, the government has been able to lawfully detain individuals based on criminal or immigration charges or based on non-controversial applications of the law of war. ***In***

⁵⁵⁹ Roth, “After Guantanamo, The Case Against Preventive Detention.”

⁵⁶⁰ Moore, “Take Al Qaeda to Court.”

⁵⁶¹ Ibid.

other words, cases such as Padilla and al-Marri are rare exceptions, they are not the rule, and we believe that it is a mistake to draw generalized conclusions about the efficacy of the criminal justice system from these isolated and in some ways anomalous cases. Further, a brand-new administrative detention scheme would reflect a significant shift in our country's traditional approach to this very important subject, could be susceptible to abuse, and would raise serious constitutional issues.⁵⁶²

2. Analysis

a. Lawfulness

The purist approach would certainly be lawful. Because it is a system permitting no preventive detention, and criminal law would be used to incapacitate and interrogate terrorists, it would not violate the Constitution or any statutes. An interesting question is whether it would even be lawful for Congress to officially suspend the writ as Justice Scalia suggests in *Hamdi* in order to create a preventive detention regime to deal with terrorist threats. As explained in Chapter IV, several war power cases such as *Ex parte Milligan* and *Duncan v. Kahanamoku* suggest that if the civilian courts are functioning and there is not a current “invasion” or “rebellion,” neither the President nor Congress could suspend the writ and have the military try and detain terrorist suspects as enemy combatants. Law Professor Ackerman notes: “[A]ny restriction on habeas corpus in response to terrorism requires Congress to explore the twilight zone of its constitutional authority: it is a stretch to say that one or two attacks – even very serious ones – amount to an ‘invasion’ or ‘rebellion,’ especially if they aren’t followed up by an ongoing series of major assaults.”⁵⁶³

Currently, this is largely an academic point because Congress has not even attempted to suspend the writ in response to 9/11. As explained in Chapter IV, in *Boumediene*, the Administration did not argue that Congress’s passing of the MCA of 2006 to deal with the detention of the aliens at Guantanamo Bay was a formal suspension

⁵⁶² Zabel and Benjamin, “In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts,” 65-66. (Emphasis added).

⁵⁶³ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 135. (Emphasis in original).

of the writ. Rather, Congress was trying to create a substitute/alternative procedure for the writ with the MCA, which was found to be unconstitutional. In sum, to the extent the purist approach represents no system of preventive detention – which is what former federal prosecutors Roth and Moore argue – it certainly would be lawful approach.

b. Security

While the enemy combatant policy prioritizes security at the expense of liberty, the purist approach does the exact opposite, prioritizing liberty at the extreme while needlessly leaving this nation vulnerable to terrorism. Then-federal judge Michael Mukasey, who is now the Attorney General, convincingly explains: “On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.”⁵⁶⁴

Although several former federal prosecutors and human rights lawyers argue that the criminal justice system has procedures in place to deal with classified material and several statutes criminalize preparatory terrorist acts, there nonetheless remains a pervading feeling of insecurity and inadequacy in fighting this war on terror with only the criminal law. RAND authors James Renwick and Gregory Treverton note in their article *The Challenges of Trying Terrorists as Criminals* that “[t]he extremely open U.S. criminal justice system cannot afford adequate protection to the classified information necessary both to prosecute and to defend in terrorist trials. Charges are often dropped or cases dismissed entirely to protect sensitive information, and even when cases are seen through to completion, information useful to terrorists about counterterrorism methods and procedures cannot help but make its way into the public record.”⁵⁶⁵

⁵⁶⁴ Mukasey, “Jose Padilla Makes Bad Law.”

⁵⁶⁵ Renwick and Treverton, “The Challenges of Trying Terrorists as Criminals,” 11.

As explained in Chapter III, during the trial of Omar Abdel Rahman, known as the “blind sheik” for participation in the 1993 World Trade Center bombing, the federal prosecutor turned over to the defense a list of two hundred possible un-indicted coconspirators in compliance with standard criminal discovery procedures. This list made it to Bin Laden within a couple days of its production in court, allowing Bin Laden to see which operatives had been compromised.⁵⁶⁶ A similar situation occurred during the trial of Ramzi Yousef, the mastermind behind the 1993 World Trade Center bombing. During his trial, there was testimony about the delivery of a cell phone that tipped off accomplices still at large that one of their communications had been compromised. According to then-federal judge Mukasey, this link had been providing “enormously valuable intelligence” and “was immediately shut down and further information lost.”⁵⁶⁷

Even former federal prosecutor Roth – an advocate of no preventive detention – acknowledges that criminal law is not perfect and the government may have to release some suspects in order to protect national security. In a world with weapons of mass destruction, and terrorists bent on murdering thousands of civilians, the cost of releasing some suspects because we cannot fashion preventive detention – which other democracies have done – seems too costly and completely unnecessary. As journalist Stuart Taylor notes, “the danger that a preventive detention regime for suspected terrorists would take us too far down the slippery slope toward police statism is simply not as bad as the danger of letting would-be mass murderers roam the country.”⁵⁶⁸

The Administration asserts – and it is certainly not hard to imagine – situations where the CIA or FBI has inadmissible evidence about a terrorist suspect or simply not enough evidence to obtain a conviction beyond a reasonable doubt. Additionally, because defendants are entitled to the evidence against them as well as any exculpatory evidence to mount their defense, there is the very real danger of having to

⁵⁶⁶ Yoo, *War by Other Means, An Insider's Account of the War on Terror*, 212.

⁵⁶⁷ Mukasey, “Jose Padilla Makes Bad Law.”

⁵⁶⁸ Taylor, “Rights, Liberties, and Security: Recalibrating the Balance after September 11.”

identify sources and methods to the suspect, which could compromise ongoing intelligence, as explained above. While the criminal justice system has ways of dealing with and mitigating these obstacles, they are not foolproof.

The United States criminal justice system is premised on the notion that one is innocent until proven guilty and it would prefer to let 100 guilty people go free than incarcerate one innocent person. That philosophy seems too damaging – if not naïve – in the world we now face. As Professor Tung Yin notes, “[b]ecause criminal law is concerned with punishment, it sets a high bar for detention. It is too high a bar to reach many al Qaeda members, even the high level architects of the 9-11 attacks who are in U.S. custody in undisclosed locations.”⁵⁶⁹ Harvard Law School’s Laurence Tribe states: “The old adage that it is better to free 100 guilty men than to imprison one innocent describes a calculus that our Constitution – which is no suicide pact – does not impose on government when the 100 who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons.”⁵⁷⁰

In addition, as explained in depth in Chapter III, there is evidence that interrogation of enemy combatants has produced actionable intelligence that has thwarted specific terrorist plots, led to the captures of other terrorists, and revealed the organizational and financial structures of al Qaeda. While obtaining a terrorist suspect’s cooperation through the criminal justice system, such as a plea bargain, works in some cases (i.e., John Walker Lindh), there is no reason to believe that it works effectively in all cases. After all, al-Marri refused to cooperate, as was his right under the criminal justice system, and presumably has provided intelligence while detained as an enemy combatant, although such an assertion is hard to assess given that he is still being detained as an enemy combatant and the Administration has not revealed what, if any, information he revealed. While certainly, as Roth notes above, intelligence officials not involved in the prosecution could question a terrorist suspect, there is evidence, as

⁵⁶⁹ Yin, “Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees,” 155.

⁵⁷⁰ Taylor, “Rights, Liberties, and Security: Recalibrating the Balance after September 11.”

explained in Chapter III, that isolation is needed to enhance interrogation potential. In sum, the purist approach does not appreciate the complexities in needing to obtain actionable intelligence.

The purist approach is also not a politically realistic approach. As Taylor notes, “[t]he demands by many human-rights advocates that all terrorism suspects be released unless proven guilty of crimes should be (or, at least, inevitably will be) rejected by the president, Congress and the courts. Some form of administrative detention – not to punish but to incapacitate terrorism suspects for whom criminal prosecution is not feasible – will be with us for the foreseeable future.”⁵⁷¹ In other words, while “doing nothing” and relying on the criminal justice system would be lawful and enhance liberty, it is simply not a realistic or credible option right now. In fact, a rule of no preventive detention under any circumstances may force executive officials to break the law in order to protect the nation. As Ackerman portends, “lawlessness, once publicly embraced, may escalate uncontrollably.”⁵⁷² It seems better to acknowledge preventive detention as a necessary evil and try to incorporate some liberty protections into a regime. Furthermore, if it is not a realistic approach, there is a concern that the criminal law will gradually change to allow preventive detention, thereby contaminating ordinary criminal procedure. Law Professor Hakima notes:

The criminal model is substantially more protective of individual rights, but if used *exclusively* in the fight against terrorism, it too carries with it potentially significant costs. States that have no choice but to charge, prosecute, and convict terrorism suspects *will inevitably adjust the criminal law to enhance its preventative capacity*. They therefore risk eroding the safeguard of the criminal justice systems and *contaminating* the law as it applies in more ordinary cases.⁵⁷³

In sum, the purist approach does an inadequate job of protecting this nation from terrorist threats.

⁵⁷¹ Stuart Taylor, “Terrorist Suspects and the Law,” *National Journal*, (May 15, 2007), <http://www.theatlantic.com/doc/200705u/detainees> (accessed July 5, 2008).

⁵⁷² Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 89.

⁵⁷³ Hakima, “International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide,” 395. (Emphasis added).

c. Liberty

Nonetheless, using the criminal justice system instead of fashioning a system of preventive detention would certainly score high marks on the liberty part of the continuum, which looks at transparency/accountability, balance of power, and being narrowly-tailored. The purist approach is certainly accountable/transparent. Pre-trial detention would be pursuant to the Bail Reform Act, which requires an adversarial hearing based on clear and convincing evidence, and is generally open to the public. Trials are also generally open to the public thereby ensuring transparency. Separation of power principles are also adhered to as the trials are administered by Article III judges. There is no executive usurpation of power. The purist approach is also narrowly-tailored. In fact, as explained above, it is arguably too narrowly-tailored and under-inclusive as it does not provide the necessary security that the United States may need to fight and contain terrorism.

d. Institutional Efficiency

At first blush, it would seem the purist approach would not incur any organizational or institutional costs because no new institutions or frameworks would need to be created. Rather, the criminal justice system as it currently exists would be used to incapacitate and interrogate terrorist suspects. Depending on how many terrorist suspects are being prosecuted, however, it could possibly strain the criminal justice system. According to then-federal judge Mukasey, criminal prosecutions of terrorists during the 1990s “yielded about three dozen convictions, and even those have strained the financial and security resources of the federal courts near to the limit.”⁵⁷⁴ Nonetheless, there have been only a handful of U.S. persons detained as enemy combatants (and only one currently) – obviously this issue is more relevant for the approximately 270 foreign nationals being detained overseas at Guantanamo Bay who, as of June 2008, have a right to be heard in federal court. The main alternative to trying enemy combatants or terrorists in federal court, however, is to create a separate court

⁵⁷⁴ Mukasey, “Jose Padilla Makes Bad Law.”

system (discussed below). Clearly, fashioning a new court system with new rules and new staff would encompass comparatively more organizational and institutional costs than exclusively using the criminal justice system to detain terrorists.

e. Conclusion

The purist approach is lawful, easy to administer, and would not require any institutional or organizational changes. It needlessly sacrifices security in this war on terror, however, when other alternatives (discussed below) can find a more nuanced balance between security and liberty. It should only be recommended if the terrorist threat is extremely low to non-existent.

C. ALTERNATIVE COURT SYSTEM

1. Description

Several individuals have proposed creating a parallel court system to deal with national security and terrorism related issues. Thomas Powers, Professor at the University of Minnesota, states: “Designing a preventive detention policy means, in effect, creating a separate legal system that applies only to a small class of persons, a system running parallel to criminal law on the one hand, and to the laws governing POWs and war criminals on the other.”⁵⁷⁵ Andrew McCarthy, a former chief Assistant U.S. Attorney who prosecuted several terrorists, suggests a specialized national security court which “would develop an expertise in issues peculiar to this realm: classified information, the Geneva Conventions, the laws and customs of war, etc., and would have jurisdiction over matters related to the detentions and any resulting trials of alleged unlawful combatants.”⁵⁷⁶ McCarthy explains that these specialized courts would be before an Article III court and not a “unilateral executive-branch production” but would resemble more a military tribunal. Furthermore, he suggests that the Justice Department could form a specialized unit “to be the liaison with the Defense Department as well as

⁵⁷⁵ Powers, “WHEN TO HOLD 'EM, The U.S. Should Detain Suspected Terrorists—Even if it Can't Make a Case against Them in Court.”

⁵⁷⁶ McCarthy, “Abu Ghraib and Enemy Combatants: An Opportunity to Draw Good Out of Evil.”

the government's representative before the national-security court."⁵⁷⁷ The specialized unit "could then report to the Court the fact that an alleged unlawful combatant had been captured and was being detained, and certify both that hostilities were ongoing and that it was in the national-security interest of the United States that the combatant be held." McCarthy posits that "for the first three years, that certification would be unreviewable."⁵⁷⁸ After three years, "the court could require the government to make a more informative representation, under seal, of the basis for continuing to hold a particular combatant."⁵⁷⁹ McCarthy also suggests that the burden of proof be lowered to preponderance of the evidence instead of proof beyond a reasonable doubt required for criminal convictions.⁵⁸⁰

Professors Jack Goldsmith of Harvard and Neal Katyal of Georgetown propose the creation of some sort of national security court for terrorism suspects, which would include interrogation. While they both acknowledge they are on opposite sides of the detention policy debate, they argue that "[a] sensible first step is for Congress to establish a comprehensive system of preventive detention that is overseen by a national security court composed of federal judges with life tenure."⁵⁸¹ They argue a national security court would have a number of advantages over the enemy combatant policy, namely a "Congressionally approved definition of the enemy"; a reduction on "the burden on ordinary civilian courts"; and "specialized" judges and defense attorneys with security clearances.⁵⁸² As Katyal states, "[c]reating a National Security Court, with repeat-player lawyers and judges, will change the entire dynamic, and help avoid the excessive rhetoric that has characterized both sides in the war on terror. It would also send a signal to the world that we have a serious process in place, one that we would feel comfortable

⁵⁷⁷ McCarthy, "Abu Ghraib and Enemy Combatants: An Opportunity to Draw Good Out of Evil."

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid. While not explicitly stated, it appears that both Powers and McCarthy's approach would encompass aliens captured overseas as well as U.S. citizens.

⁵⁸¹ Goldsmith and Katyal, "The Terrorists' Court."

⁵⁸² Ibid.

applying to our own citizens.”⁵⁸³ While criminal prosecutions would continue where feasible in ordinary federal court, Katyal and Goldsmith posit that a national security court, “explicitly sanctioned by Congress, would have greater legitimacy than our current patchwork system, both in the United States and abroad.”⁵⁸⁴ Katyal notes: “Would I love every case to be tried in criminal court? Of course. The reality is, when you’re dealing with foreign investigations, particularly concerning events that occurred a long time ago, there are going to be a small handful of cases that you can’t try in criminal court.”⁵⁸⁵

Harvey Rishikof of the National Defense Institute also advocates the use of a specialized “Federal Terrorism Court.”⁵⁸⁶ According to Rishikof, “[t]he current adjudicative framework for the post-9/11 terrorism detentions and prosecutions has undermined American credibility at a crucial juncture; weakened national confidence in our political institutions; and called into question our commitment to the letter and spirit of our laws.” Thus, he recommends a “specialized court for terrorism cases [that] would allow our system to handle not only the unique legal complexities of terrorism, but the physical risks as well. Such a court could be situated in a designated courthouse with security measures that are more stringent than those found in most federal courts, with state of- the art facilities and procedures for holding and transporting suspects; storing evidence; protecting judges, jurors and witnesses; and transmitting or receiving televised testimony.”⁵⁸⁷ He proposes a “Federal Terrorism Court Commission” to recommend a “model legislative proposal” within the next six months.⁵⁸⁸

⁵⁸³ Stuart Taylor, “Case for National Security Court,” *National Journal*, February 27, 2007, http://www.theatlantic.com/doc/200702u/nj_taylor_2007-02-27 (accessed July 5, 2008).

⁵⁸⁴ Goldsmith and Katyal, “The Terrorists’ Court.”

⁵⁸⁵ Jeffrey Toobin, “Annals of Law, Camp Justice,” *The New Yorker*, 6 April 14, 2008, http://www.newyorker.com/reporting/2008/04/14/080414fa_fact_toobin?currentPage=1 (accessed June 24, 2008).

⁵⁸⁶ Rishikof, “A Federal Terrorism Court.”

⁵⁸⁷ *Ibid.*, 2.

⁵⁸⁸ *Ibid.*, 4.

2. Analysis

a. Lawfulness

A separate court system to deal with national security and terrorist threats would most undoubtedly be lawful if (1) created by Congress and (2) it allowed a meaningful opportunity for the detainees to rebut the underlying evidence establishing their need to be preventively detained. As explained in Chapter IV, the plurality in *Hamdi* held that U.S. citizens captured in a zone of combat can be designated as an enemy combatant and held indefinitely until the particular conflict is over as long as the detainees can challenge the underlying evidence in a neutral forum. While *Hamdi* concerned a U.S. citizen detained on an actual battlefield – as opposed to an otherwise peaceful civilian area – there is no reason to believe that creating a separate court system run by federal judges would pose any legal obstacles when terrorist suspects are arrested in a non-battlefield environment. In fact, in *Hamdi* the plurality noted that the factfinder could be run by the *executive* branch in the form of an “authorized and properly constituted military tribunal.”⁵⁸⁹ Hence, creating a system run by the judiciary would only provide more legitimacy than called for in *Hamdi*.

The more complicated question concerns the underlying rights allowed the detainees in the national security court. Of all the plans articulated above, the only one that may pose a problem is McCarthy’s plan, which calls for a three-year unreviewable designation of an individual as an unlawful combatant. Although *Hamdi* did not specify when judicial review must occur, it is doubtful that the plurality would uphold three years of incommunicado and unreviewable detention. Wittes and Gitenstein from the Brookings Institution urge the next Administration to create a new preventive detention regime that encompasses an impartial decision-maker; basic procedural protections for detainees; assistance of counsel; written, public opinions explaining the basis for each status determination; review of such determinations by federal civilian courts; and

⁵⁸⁹ *Hamdi*, 542 U.S. at 538.

ongoing judicial review for detainees subjected to detention.⁵⁹⁰ If a national security court upheld such principles, and it seems like most, if not all, of proposals advocated would, then they would likely be found to be lawful.

b. Security

With respect to the security-liberty continuum, the creation of a national security court balances security and liberty much better than does the purist or enemy combatant approaches, which dominate the extremes of the spectrum. While a national security court as envisioned above is more focused on the question of *where* to try terrorist suspects – as opposed to the rationales of general incapacitation and interrogation – it can be assumed that either Congress or the judges running a national security court would develop rules determining under what circumstances interrogation and incapacitation are allowed before an actual trial. The national security court receives relatively high marks regarding security. Because the burden of proof would be lower (as McCarthy suggests) and hearsay evidence would presumably be allowed (after all, the plurality in *Hamdi* said hearsay could be used), it would be easier than the normal criminal justice system to detain an individual, which is the overriding point. While this means an innocent person could be detained, as explained above, perhaps that is the risk we face to protect this nation from a terrorist threat in a world with weapons of mass destruction.

There is one potential drawback to security, however. As RAND authors Renwick and Treverton note, an argument could be made that prosecuting terrorists in a specialized court could afford them an elevated status and increase their credibility and legitimacy in the eyes of the public, and perhaps even generate public sympathy for them.⁵⁹¹ If this happened, there could be an increase in terrorism, thereby undermining security. This concern, while plausible, seems unlikely. Providing terrorist suspects due process in a specialized court run by federal judges is certainly an improvement over the

⁵⁹⁰ While they are focused on the foreign nationals at Guantanamo Bay, there is no reason their principles could not be applied in creating a preventive detention regime for U.S. persons.

⁵⁹¹ Renwick and Treverton, “The Challenges of Trying Terrorists as Criminals,” 13.

status quo enemy combatant policy. As al-Marri's brother has stated: "If the guy is guilty, prove he is guilty and we will accept that. If he is not guilty, then why hold him all these years? . . . At least he should get justice."⁵⁹² A specialized court system, especially one that adhered to the principles espoused by Wittes and Gitensten, would provide justice.

c. Liberty

The national security court would provide more liberty protection than the enemy combatant approach. There would be accountability, especially if the national security court were required to report to Congress on its operations and if there were written, public opinions explaining the basis for each status determination. There would probably be less transparency than the purist approach but more than the enemy combatant approach. While a specialized court system that handles classified information could not be open to the public, and cleared defense counsel would need to assist the detainees, it is not clear how much less transparency there actually would be than in the purist approach, which can and does close proceedings to the public based on national security concerns. When deciding where the national security court fits on the liberty part of the liberty/security continuum, it is less transparent than the purist approach because presumably most if not all of its proceedings are closed to the public. Of course, as explained above, this lowering of liberty (i.e., less transparency) results in a consummate increase in security.

With respect to the balance of power, the national security court, which is run by federal judges and created by Congress, would uphold separation of power principles. There is a benefit to liberty when federal judges – and not just the executive branch – monitor the preventive detention regime. Law professors Mario Barnes and F. Greg Bowman emphasize the unique role that judges play in America's system of government: "Judges, or at least federal judges, are seen by law and economics scholars as rational actors in the pursuit of public welfare because the judicial system removes

⁵⁹² White, "Lawyers Fear for Marri's Sanity."

most, if not all, possibility for a judge to gain personally from his or her substantive rulings. As a result, only efficiency-driven principles remain as animating judges' decisions."⁵⁹³

The main drawback with the creation of the national security court is that it could result in being overbroad. While Goldsmith and Katyal argue that prosecutions in ordinary criminal court would continue where feasible, who would make the decision of where to try the terrorist suspect? Would lone wolf or solely domestic terrorists like Timothy McVeigh be tried in the national security court? McCarthy suggests that the executive branch would have to certify there were ongoing hostilities before labeling someone an "unlawful combatant" and subjecting them to the national security court. But if the national security court determines the individual is not an unlawful combatant but a mere criminal is the trial then transferred to the ordinary criminal court where it starts from scratch? If the government brings a terrorism prosecution in ordinary criminal court, can the defendant request for his case to be transferred to the national security court? If the national security court is effective at prosecuting and detaining terrorists, would there not be an argument that it should encompass complicated espionage or drug cases where classified material also predominates? There are certainly answers to these questions, and the answers do not suggest that a national security court is unworkable. These issues, however, do introduce one fundamental ingredient better to be avoided: *new jurisdictional issues and turf wars*. If the six years of litigation concerning the foreign nationals at Guantanamo has showed us anything, it is that jurisdictional issues mixed with minimalist holdings is not recipe for success. In creating a system of preventive detention, introducing new jurisdictional issues is best to be avoided so the substance, i.e., is this person a terrorist who needs to be incapacitated or interrogated, can predominate.

It also is unclear whether a national security court really needs to create infrastructure to protect its participants. While terrorists no doubt want to murder

⁵⁹³ Mario Barnes and F. Greg Bowman, "Entering Unprecedented Terrain: Charting a Method to Reduce Madness in Post 9/11 Power and Rights Conflicts," *University of Miami Law Review*, 62 (January 2008): 381.

civilians, they are pretty indiscriminate. It seems that drug dealers, organized crime, and gang members are more motivated to kill specific jurors, prosecutors and judges than terrorists. Would such a realization make it more likely to get such cases transferred to the ultra-secure national security court, again increasing its overbreadth and potential for mission creep?

Thus, with respect to the liberty part of the equation, the national security court gets a mixed review. As explained in Chapter III, creating a new forum for trials is a separate, albeit related, question of whether there needs to be preventive detention for purposes of incapacitation and interrogation. It could be argued that the proposal of a national security court for trials is an overboard solution to the question of preventive detention. Nonetheless, a national security court could be made accountable and it does adhere to balance of power principles. On the other hand, it is not transparent and arguably is not narrowly-tailored to meet its objectives. It has a potential problem with mission creep and should this solution be chosen, some clear boundaries and guideposts are going to need to be developed. Overall, it balances security with liberty better than the purist approach and the enemy combatant policy. Because it is not transparent, lowers the burden of proof, and eliminates/reduces evidentiary issues that pose a problem with the ordinary criminal justice system, it tilts more towards security than liberty.

d. Institutional Efficiency

The creation of a separate court system would pose huge organizational /institutional costs. While there are currently specialized federal courts for bankruptcy, tax, patent, and international trade, creating a new court system to deal with terrorists would entail significant costs in the form of (1) deciding which judges would hear the cases; (2) creating the secure facilities that Rishikof and presumably others believe is essential; (3) hiring new staff; (4) creating a new body of law for such cases (i.e., would judges borrow from ordinary criminal law or would new precedents have to be established); (5) and, as discussed above, deciding which terrorists should be tried in ordinary criminal courts and which terrorists merit the specialized court system. As Zabel and Benjamin argue in their white paper:

We note, however, that one significant downside of a new national security court would be the *need to create from scratch the procedures, precedents, and body of law that would govern such a court*. The disarray that has plagued the military commissions at Guantánamo—with abundant litigation as well as internal dissension within the military command structure but not a single completed trial some six years after the presidential order authorizing military commissions—does not bode well for those who envision creating a brand new system from scratch. By contrast, a significant advantage of the criminal justice system is the fact that the federal courts have amassed many years of experience and a reservoir of judicial wisdom as well as a broadly experienced bar—both prosecutors and defense attorneys—to guide the course of particular cases.⁵⁹⁴

Hence, as a matter of comparison, creating a new court system incurs much more organizational and institutional costs than the purist approach, which relies exclusively on the criminal justice system, or the enemy combatant approach, which transfers detainees to military custody.

e. Conclusion

A national security court would be lawful and provide a more nuanced balance between liberty and security than either the enemy combatant or purist approaches. Its strengths are its adherence to balance of power principles (i.e., being run by federal judges) and its ability to handle classified and other evidentiary issues that the normal criminal justice system may not be able to consistently provide. As Wittes observes, “[i]t would put detentions in the hands of judges with all the prestige of the federal court system yet with particular expertise applying rules designed to protect classified information and manage legitimate security concerns.”⁵⁹⁵ Its negatives are that it poses substantial organizational and institutional costs, especially if a new body of law has to be developed and jurisdictional questions arise, and there is a concern with it potentially becoming overbroad and infecting ordinary criminal law. A national security

⁵⁹⁴ Zabel and Benjamin, “In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts,” 3. (Emphasis added).

⁵⁹⁵ Wittes, “Improving Detainee Policy: Handling Terrorist Detainees within the American Justice System.”

court also seems to be an overbroad solution to the question of preventive detention. It should only be recommended if the terrorist threat is extremely high and there are a large number of terrorists needing to be tried, thereby justifying the substantial organizational and institutional costs.

D. MODIFYING EXISTING STATUTES/LAW

1. Description

Philip Heymann of Harvard Law School and Juliette Kayyem at the Kennedy School of Government have proposed a solution to preventive detention using the current criminal justice system with no provisions for an alternative court system.⁵⁹⁶ In their detailed proposal, they distinguish between individuals caught in an active zone of combat and U.S. persons arrested in the United States. With respect to the former, they suggest that the U.S. Constitution, the decisions interpreting it, and the relevant Geneva Conventions be fully honored.⁵⁹⁷

With respect to the latter – civilians seized within the U.S. – they suggest that such individuals only be detained pursuant to criminal charges and probable cause that the individual has committed or is planning to commit an act previously criminalized by statutes.⁵⁹⁸ Unlike the purist approach discussed above, however, they would allow for pre-trial detention for an initial ninety days up to two years on an *ex parte* showing that a trial would be “impossible without a severe loss of national security secrets” or that the release of the detainee would “significantly endanger the lives of others.”⁵⁹⁹ They would also allow an initial interrogation of up to seven days with no access to counsel if there is a “showing that the individual arrested has information which may prevent a terrorist

⁵⁹⁶ Heymann and. Kayyem, “Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism,” 33-50.

⁵⁹⁷ *Ibid.*, 34-35.

⁵⁹⁸ *Ibid.*, 36.

⁵⁹⁹ *Ibid.*, 37.

attack.”⁶⁰⁰ Significantly, any “statement obtained by custodial interrogation in the absence of a lawyer” would not be admissible in any criminal prosecution of the detainee.⁶⁰¹

Serrin Turner and Stephen Schulhofer at NYU also argue that suspected terrorists should be tried in Article III courts using current statutes, such as the Classified Information Protection Act (CIPA), the 1984 Bail Reform Act, and the Speedy Trial Act, perhaps with modifications by Congress.⁶⁰²

By way of background, CIPA was created in 1980 to facilitate the prosecution of Cold War spies.⁶⁰³ It provides the government with alternatives to complete disclosure of classified information, such as in camera reviews of classified material, protective orders, allowing cleared counsel but not the defendant to view the classified material, or substitutions for classified material such as redacted versions of classified information or unclassified summaries of material.⁶⁰⁴ At all times, the government retains full control not to disclose classified information if it believes that national security interests outweigh prosecutorial gains.⁶⁰⁵

The Bail Reform Act allows defendants to be held in pre-trial detention if the court finds there is no reasonable way to assure that the defendant will not pose a danger to the public if released. While the defendant is entitled to an adversarial hearing, he does not have the same confrontation rights as he does at a trial, and the government can use hearsay from a confidential source without the informant appearing in court.⁶⁰⁶

The Speedy Trial Act usually requires a trial within a certain prescribed time limit after indictment. The Act permits delay of trial, however, when failing to grant a

⁶⁰⁰ Heymann and. Kayyem, “Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism,” 37.

⁶⁰¹ Ibid.

⁶⁰² Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*.

⁶⁰³ Ibid., 18-19; see also *Classified Information Protections Act (CIPA)*, Public Law 96-456, *U.S. Statutes at Large* 94 (1980): 2025.

⁶⁰⁴ Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*, 19-21.

⁶⁰⁵ Ibid., 9.

⁶⁰⁶ Ibid., 38-39; see also *Bail Reform Act of 1984*, *U.S. Code* 18, §§ 3141-3150, 3156.

postponement could result in a “miscarriage of justice” or when the case is “so unusual or so complex, due to . . . the nature of the prosecution . . . that it is unreasonable to expect adequate preparation for pre-trial proceedings or for the trial itself” within the usual time limits.⁶⁰⁷

Turner and Schulhofer posit that a combination of CIPA, the Bail Reform Act, and the Speedy Trial Act could be fashioned to detain terrorist suspects before trial and allow for successful prosecutions in Article III courts. As they explain, the need to protect sensitive information is not unique to terrorism cases, as espionage, organized crime, and drug cases can raise similar issues.⁶⁰⁸ If existing statutes are not able to deal with terrorism suspects, then they suggest Congress “upgrade” these statutes as opposed to creating a separate court system: “if expanded detention is determined to be acceptable, adjusting the machinery already available within the federal court system is infinitely preferable to the government’s current use of military detention to hold terrorism suspects indefinitely, beyond the reach of any judicial review.”⁶⁰⁹ They also suggest using alternative criminal charges or delaying certain charges until classified material becomes less sensitive, as other avenues for trying terrorism suspects in Article III courts.⁶¹⁰

Rosenzweig and Carafano from the Heritage Foundation argue that Congress should create a legal architecture for preventive detention. In their proposal, they recommend a narrow definition of terrorism so the “gate” for preventive detention is limited.⁶¹¹ They suggest that the Attorney General certify the necessity of preventive detention when there is “credible evidence” that: “(a) the individual to be detained intends to commit a terrorist act; (b) the individual is affiliated with a terrorist organization; and (c) the existing criminal legal justice system cannot be applied to the

⁶⁰⁷ Turner and Schulhofer, *The Secrecy Problems in Terrorism Trials*, 39; see also *Speedy Trial Act*, U.S. Code 18 (2000), §§ 3161-74.

⁶⁰⁸ *Ibid.*, 9.

⁶⁰⁹ *Ibid.*, 40.

⁶¹⁰ *Ibid.*, 35-40.

⁶¹¹ Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 8.

individual without compromising national security.”⁶¹² They also recommend that the “certification” be subject an adversarial process and judicial review. Significantly, they would allow a 30-day delay of judicial review for purposes of incommunicado interrogation and allow an extension if the government could show by “clear and convincing” evidence that a further delay would likely provide additional intelligence.⁶¹³

A final idea under this category of modifying existing law is to use a “noncriminal detention model” to incapacitate terrorist actors who potentially pose a danger to society but are not criminally culpable. Law Professor Tung Yin advocates this approach in *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*. While his specific proposal only concerns foreign nationals detained overseas, there is no reason his ideas could not apply to U.S. persons detained in the United States – a fact he expressly concedes.⁶¹⁴ Under his approach, he argues that, similar to how the mentally ill and sex offenders can be civilly committed, medically contagious people quarantined, and defendants denied bail and held in pre-trial detention before trial, terrorists could be detained non-criminally based on their “dangerousness.”⁶¹⁵ In order to protect civil liberties so the government did not try to prove that every individual poses a danger to society, he advocates a “limiting factor” based on Congress defining this approach to only apply to individuals who either played a role in planning or carrying out the 9/11 attacks or sheltered those responsible.⁶¹⁶ As for defining “dangerousness,” he suggests some relevant factors such as “the amount of terrorism training that the detainee has received, the detainee’s expressed willingness to engage in terrorism and the type of terrorist attack contemplated, and the prior violent conduct of the detainee.”⁶¹⁷ In fact, Yin states that “the more devastating a terrorist attack in which a detainee is willing to take part (regardless of

⁶¹² Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 8.

⁶¹³ *Ibid.*, 9.

⁶¹⁴ Yin, “Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees,” 193.

⁶¹⁵ *Ibid.*, 150-212.

⁶¹⁶ *Ibid.*, 190.

⁶¹⁷ *Ibid.*, 199.

whether such an attack has reached the stage of criminal attempt), the more likely [the judge] would conclude that the detainee is dangerous and will remain dangerous for a longer period of time.”⁶¹⁸ As for the procedural requirements of such a regime, Yin would allow counsel, periodic evaluations to measure continued dangerousness, and some sort of neutral forum “free from actual bias” either run by Article III judges with life tenure or administrative or military judges.⁶¹⁹

Former Deputy Attorney General George Terwilliger also proposes a preventive detention regime modeled on federal and state civil commitment schemes: “In light of the similar governmental ends sought to be achieved in civil commitment proceedings and by the proposed preventive detention regime -- ensuring fair procedures, accurate fact-finding, and the safety and security of society -- the structure of civil detention regimes is worth consideration in constructing a fair and effective preventive detention regime.”⁶²⁰ Similarly, journalist Wittes also has suggested that terrorists be civilly committed as mentally ill because they pose a danger to themselves and others. As he comments, “[f]or a reasonably imaginative Congress, [civil commitment] might be a far better model for the alleged al Qaeda operative captured domestically than either the traditional laws of war or the criminal justice apparatus.”⁶²¹

2. Analysis

a. Lawfulness

While the aforementioned proposals differ in their substantive details, most of them would likely be lawful if enacted by Congress, thereby obviating any concerns with the Non-Detention Act. With respect to constitutional concerns, Schulhofer and Turner’s proposal of using the criminal justice system with upgrades to

⁶¹⁸ Yin, “Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees,” 199.

⁶¹⁹ *Ibid.*, 202-07.

⁶²⁰ Terwilliger, “Domestic Unlawful Combatants’: A Proposal to Adjudicate Constitutional Detentions,” 61.

⁶²¹ Wittes, “Judicial Baby-Splitting,” 120.

statutes such as CIPA, the Speedy Trial Act, Bail Reform Act, should not pose any legal obstacles. Their recommendation is similar to the purist approach (discussed in detail above and found to be legal) with modifications to current statutes. Assuming the modifications are reasonable, their approach will be lawful.

Similarly, Rosenzweig and Carafano's approach in which the Attorney General would certify the necessity of preventive detention when there is "credible evidence" that an individual intends to commit a terrorist act, is affiliated with a terrorist group, and the criminal justice system is inadequate to incapacitate would also likely be constitutional as long as there was an adversarial process, assistance of counsel, and judicial review, which their proposal specifically allows. Permitting a 30-day delay of judicial review for purposes of incommunicado interrogation would also be constitutional as long as any information obtained from the detainee were not subsequently used against him to convict him of a crime. As will be explained in more detail below with the FISA court analysis, there is only a Fifth Amendment violation if a coerced confession is used at trial – there is no constitutional prohibition to interrogation without an attorney to obtain intelligence information. There would be a substantive due process violation for torture that "shocks the conscience" but one assumes their approach does not sanction torture.

Conversely, Heymann and Kayyem's approach that would allow for pre-trial detention for an initial ninety days up to two years on an *ex parte* showing that a trial would be "impossible without a severe loss of national security secrets" or that the release of the detainee would "significantly endanger the lives of others" may prove to be unconstitutional. Pursuant to *Hamdi*, the detainees must be able to challenge their designation as an enemy combatant in a neutral forum with the assistance of counsel. To the extent that their proposal would allow a detainee to be detained for two years on an *ex parte* showing, without counsel, with no way to challenge the underlying evidence, this could prove to violate *Hamdi*. Of course, as discussed in Chapter IV, *Hamdi* did not address how long an individual could be held before receiving judicial review, so while two years would presumably be too long, a shorter amount of time tied to showings of necessity may prove to be constitutional.

It is unclear whether a civil commitment scheme to detain terrorists based on showings of mere “dangerousness” would prove to be constitutional. As with most things, the devil would be in the details of how it was orchestrated and applied. The concern would be detaining individuals based on past behavior and thoughts as opposed to actions and plans. Certainly Yin’s approach of a “limiting factor” to apply to individuals who either played a role in planning or carrying out the 9/11 attacks or sheltered those responsible would help limit its scope, which tends to be overbroad, discussed below. Nonetheless, civil commitment schemes are usually employed to detain individuals who have a mental disease/illness and cannot control their behaviors. While it is tempting to categorize terrorists – especially suicidal ones – as irrational and crazy, most of the scholarly literature addressing the topic suggests terrorists are rational actors and fully understand and appreciate what they are doing.⁶²² In sum, it is unclear whether a civil commitment scheme to detain terrorists would be constitutional.

b. Security

As for the security component of the liberty-security continuum, these proposals differ depending on the due process rights afforded the detainees. To the extent that these proposals would allow hearsay, allow for a period of incommunicado interrogation, lower the burden of proof for detention, and consider otherwise inadmissible evidence (as does the creation of a national security court, discussed above), security would rise at the expense of liberty interests because there would be a correspondingly greater risk of detaining an innocent person. This concern would be especially acute with civil commitment schemes that were not narrowly-tailored. The more the specific proposal resembles the criminal justice system with its emphasis on due process (such as Schulhofer and Turner’s approach), the more the proposal tends to move towards the purist approach, where liberty is favored over security. The more the proposal tends to differ from the criminal justice system, such as a civil commitment

⁶²² See, e.g., Hoffman, *Inside Terrorism*, 229-256; Fathali M. Moghaddam, *From the Terrorists’ Point of View* (Westport, CT and London: Praeger Security International, 2006), 1-11; Clark McCauley, “Psychology Issues in Understanding Terrorism and the Response to Terrorism,” in *The Psychology of Terrorism*, ed. Christopher Stout (Bryn Mawr, PA: Greenwood Publishing, 2004).

scheme or Rosenzweig and Carafano's Attorney General certification approach, the more the proposal moves towards the national security courts, where security is favored over liberty. Heymann and Kayyem's approach, which uses the criminal justice system based on probable cause that a crime has been committed *after* an initial period of *ex parte* detention for purposes of incapacitation and interrogation, appears to provide an equitable balance between security and liberty, mainly because it separates out the differing reasons for preventive detention. Their approach recognizes that trials of terrorists are a somewhat distinct inquiry from the rationales of incapacitation and interrogation, although as discussed above, the two year *ex parte* detention could prove to be unlawful.

c. Liberty

With respect to liberty, the proposals outlined above appear to be accountable and transparent. As for balance of powers, all of these proposals encompass (1) Congress amending or modifying a statute and (2) an adversarial process run by the judicial branch. There is no executive usurpation of power as with the enemy combatant policy. As for being narrowly-tailored to meet its objectives, there are overarching concerns that modifying the criminal justice system to encompass detention of terrorists could gradually infect ordinary criminal law. Mukasey notes: "If conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law"⁶²³ Thus, there is a concern that by modifying the criminal justice system for terrorists, whether by enlarging a civil commitment scheme or upgrading statutes such as CIPA, the Bail Reform Act, or Speedy Trial Act, those measures could gradually broaden to encompass non-terrorist but other dangerous activity.

Rosenzweig and Carafano's recommendation seems to be the most narrowly-tailored to meet its objectives in that they recommend a narrow definition of terrorism so the "gate" for preventive detention is limited. To the extent other proposals in this section similarly apply a narrow initial definition or "limiting factor," then

⁶²³ Mukasey, "Jose Padilla Makes Bad Law."

concerns with being overbroad would be mitigated. In sum, upgrading or modifying the criminal justice system would uphold balance of power principles and be generally accountable and transparent (except for the up to two years of *ex parte* detention in Heymann and Kayyam’s proposal) but has the potential to be overbroad and adversely infect ordinary criminal law if care is not taken to specifically define the definition of terrorism and other “limiting factors.”

d. Institutional Efficiency

There would appear to be low organizational and institutional costs with making modifications to existing statutes and laws. As discussed above with respect to the purist approach, using the criminal justice system – even with changes to existing statutes – is certainly less cumbersome than creating an entirely new court system.

e. Conclusion

The approach of upgrading or modifying the criminal justice system encompasses many different proposals that all appear to temper security with liberty protections. They are generally accountable and transparent and abide by separation of power principles. As with the national security court approach, however, the proposals all have the potential to be overbroad and not narrowly-tailored to meet their objectives if they tend to infect ordinary criminal justice. This concern can be mitigated by careful legislative proposals that focus on narrow definitions of terrorism and other “limiting factors.” Because the proposals would be enacted by Congress, they would appear to be lawful with the caveat of possibly Heymann and Kayyam’s two years of *ex parte* detention being found to be unconstitutional, or the civil commitment schemes being found to be too overbroad if they encompass mere thought crimes. The main advantage of modifying current statutes – as opposed to creating a whole new national security court – is that the institutional and organizational costs are comparatively low. This solution should be recommended if the terrorist threat and need for preventive detention is

medium to high where there are not so many terrorists needing to be preventively detained that the criminal justice system, even with the proposed modifications, becomes overwhelmed.

E. “EMERGENCY CONSTITUTION”

1. Description

Bruce Ackerman, law professor at Yale University, argues in his book *Before the Next Attack* that new legislation in the form of an “emergency constitution” should be enacted that would allow the President to detain terrorism suspects for forty-five days based on “reasonable suspicion” after a terrorist attack as a way to prevent a possible and unknowable second strike.⁶²⁴ If the suspects turn out to be innocent, then they should be compensated \$500 a day per confinement.⁶²⁵ While Ackerman acknowledges that the “dragnet will undoubtedly sweep many innocents into detention,” he argues that it also “may well catch a few key actors: disrupting the second strike, saving lots of lives, and deflecting a blow to the body politic.”⁶²⁶

According to Ackerman, “a terrorist attack triggers pervasive uncertainty throughout the country about our collective capacity to maintain the fabric of public order.”⁶²⁷ An emergency constitution would reassure the public both symbolically and functionally after a devastating terrorist attack when the citizenry does not know if there will be second deadly strike. The emergency constitution would give the executive “extraordinary powers” but “only for a short period, with extensions granted reluctantly [by Congress] and in response to the evolving exigencies of the situation.”⁶²⁸ Ackerman explains that if “we use war to cover emergencies, we will allow our response to terrorist attacks to become too oppressive for too long.” Yet, if we “expand the definition of

⁶²⁴ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 46.

⁶²⁵ *Ibid.*, 54.

⁶²⁶ *Ibid.*, 47.

⁶²⁷ *Ibid.*, 45.

⁶²⁸ *Ibid.*

crime to cover emergencies, we will succeed in normalizing the oppressive use of criminal law during periods of relative calm.”⁶²⁹ Hence, he posits that an emergency constitution will “permit an effective short-term response without generating insuperable long-term pathologies.”⁶³⁰ Under his proposal, which encompasses additional powers beyond preventive detention, the executive would be able to act unilaterally for a brief period of about one to two weeks – long enough for the legislature to convene and consider the issues. Unless it gained a majority approval by Congress, the state of emergency would end. Every two to three months, any state of emergency would need to be supported by “an escalating cascade of supermajorities” such as sixty, seventy and eighty percent for each subsequent period.⁶³¹ In this way, the executive’s emergency powers would be short-lived and controlled by Congress depending on the state of the nation.

2. Analysis

a. Lawfulness

As Ackerman reluctantly concedes, it is unclear whether detaining suspects for forty-five days based on reasonable suspicion – as opposed to the current requirement of forty-eight hours based on probable cause – would be constitutional, although he makes a detailed and somewhat convincing argument that it would be. As a preliminary matter, Ackerman’s emergency constitution requires Congress to enact a “framework statute” – it does not require any formal amendment to the Constitution.⁶³² Ackerman defines a “framework statute” as a statute that seeks “to impose constitutional order on problems that were unforeseen by the Founders.”⁶³³ An example is the Administrative Procedure Act, which imposed the rule of law on the regulatory state.

⁶²⁹ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 49.

⁶³⁰ *Ibid.*, 77.

⁶³¹ *Ibid.*, 80.

⁶³² *Ibid.*, 77, 122.

⁶³³ *Ibid.*, 123.

According to Ackerman, detaining suspects for forty-five days based merely on reasonable suspicion would require Congress to suspend the writ of habeas corpus. Because his emergency constitution only applies *after* a serious terrorist attack, and because Congress would need to uphold these powers with an increasing cascade of supermajorities (the first one to occur one to two weeks after the emergency, before the ending of the forty-five days), he posits that Congress could suspend the writ under these circumstances. He seems to argue that because the cascade of supermajorities would make it difficult to actually suspend the writ, that it would be done rarely and hence be constitutional: “The supermajoritarian escalator provides institutional recognition that suspension is a very serious constitutional manner, and that Congress is perfectly cognizant of its limited power to act in cases of ‘rebellion’ or ‘invasion.’”⁶³⁴ Yet, upon scrutiny, it does not seem that the supermajoritarian escalator is at all relevant to whether there actually is an “invasion” or “rebellion.” The fact that Ackerman’s framework statute would make it *procedurally* more difficult for Congress to suspend the writ (a supermajoritarian required instead of a majority) does not have any bearing on the substantive nature of the emergency (i.e., whether there is an “invasion” or “rebellion.”)

Nonetheless, Ackerman’s forty-five days of preventive detention based on reasonable suspicion may serve as an adequate *substitute* for the writ, something he does not appear to consider. According to Ackerman, at the beginning of the forty-five day period, there would be an initial preliminary hearing before a judge, and the prosecution would have to present some evidence, such as a statement from the security services, to merit reasonable suspicion. Ackerman emphasizes, however, that this would not be a forum to “weigh the evidentiary basis for the detention.”⁶³⁵ After forty-five days, the prosecution would need to make a case under the standard criminal law. In essence, the forty-five days appear to be identical to Britain’s use of pre-charge detention to detain terrorist suspects while an investigation continues to gather more evidence. Ackerman notes that if the evidence meriting the “reasonable suspicion” turns out to have been a

⁶³⁴ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 135.

⁶³⁵ *Ibid.*, 107.

mere fabrication, then that can serve as a later basis for punitive damages.⁶³⁶ And, as noted above, if a detainee is not charged with any crime after the forty-five days, he would be entitled to compensation. Ackerman posits that while there will be a “reduction of due process in the short run” it will be “followed by its enhancement over the long run.”⁶³⁷

While a detailed description of adequate substitutions for the writ is beyond the scope of this chapter (it is briefly touched on with respect to the FISA court analysis below), an argument could be made – although Ackerman is not making it – that his proposal would be an adequate substitute for the writ with enough protections not to merit a true “suspension.” In fact, his proposal seems to be similar to Heymann and Kayyem’s discussed above where a detainee can be held ninety days up to two years on an *ex parte* showing of dangerousness and/or necessity after which the normal criminal justice system would take over. The pivotal and unanswered question is how long can a detainee be held without adequate judicial review. *Hamdi* left that question unresolved. If Ackerman’s protections were found to be an adequate substitute of the writ, then it would be lawful. In sum, its lawfulness remains unclear.

b. Security

The liberty/security spectrum raises an interesting conundrum because there needs to be two separate analyses. One fundamental drawback to Ackerman’s approach is that it does not come into play until after there has been an actual attack where thousands of lives are lost. In fact, Ackerman explicitly rejects having it apply based on “an imminent attack” or on a finding of “clear and present danger.”⁶³⁸ Surprisingly, he even states that 9/11 “represents the low end for the legitimate imposition of a state of emergency.”⁶³⁹ Apparently, more than 3,000 people have to actually die before Ackerman’s solution kicks in. Hence, while all the other proposals for

⁶³⁶ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 107.

⁶³⁷ *Ibid.*, 115.

⁶³⁸ *Ibid.*, 91.

⁶³⁹ *Ibid.*, 92.

preventive detention are concerned with *initially* saving lives, Ackerman's proposal is focused on reassuring the public before a possible second attack. Therefore, before an actual attack occurs, his approach is basically identical to the purist approach – i.e., no system of preventive detention. Hence, it protects liberty to the extreme at the expense of security, does not balance the two at all, and leaves the United States needlessly vulnerable to terrorism.

After an actual attack – when his solution finally kicks in – another analysis needs to be done. At this point, terrorist suspects are preventively detained – similar to Britain – in forty-five days of pre-charge detention based on reasonable suspicion, which is a lower standard than the normal criminal law requirement of probable cause. Ackerman's forty-five days of preventive detention based on reasonable suspicion would err on security. While he acknowledges that his solution will capture many innocents, he focuses on the fact that a “few key actors” will be incapacitated thereby “disrupting the second strike, saving lots of lives, and deflecting a blow to the body politic.”⁶⁴⁰ In other words, for the first forty-five days his solution prioritizes security over liberty. Yet, ironically, after the forty-five days is over, the balance shifts the other direction. Then, the normal criminal justice system must be applied. As explained with the purist approach, there are situations where the criminal justice system is inadequate to incapacitate terrorist suspects. While those reasons are not repeated here (please see analysis of purist approach), those reasons do not evaporate after a mere forty-five days. There will still be issues with compromising sources and methods, inadmissible evidence, and other evidentiary issues. Hence, after forty-five days, his approach prioritizes liberty over security. In sum, Ackerman's emergency constitution alternates between two extremes and does not seem to balance security with liberty.

c. Liberty

With respect to accountability and transparency, however, his solution is remarkably progressive. Ackerman argues that congressional oversight committees should monitor the President's decisions under the emergency constitution (which again

⁶⁴⁰ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 47.

encompass more than just preventive detention) and that members of the opposition political party should be guaranteed the majority of seats on the oversight committees.⁶⁴¹ He further argues that the emergency constitution should require the executive to “provide the committees with complete and immediate access to all documents.” In this way, the President and his advisors are “on notice that they can’t keep secrets from key members of the opposition, and it serves as an additional check on the abuse of power.”⁶⁴²

With respect to balance of power principles, his solution (after an actual attack) also scores high marks. Congress would be directly monitoring the situation every one to two weeks and then every two, three and four months, and continued emergency powers would need to be approved by Congress based on increasing supermajorities. The judiciary would also be directly involved in monitoring preventive detention. Federal judges would preside over the initial preliminary hearing, which appears to be perfunctory, and then would monitor the criminal justice system after the forty-five days have ended.

At first blush, his solution, at least with respect to preventive detention, seems narrowly-tailored to meet its objectives. It is basically forty-five days of pre-charge detention based on reasonable suspicion and then the normal criminal justice system continues. Yet, after an actual attack, it seems likely that the executive branch in an attempt to protect the American public would detain many innocent people for forty-five days in order to “play it safe.” In other words, Ackerman’s solution tends to be overbroad. It is unclear that the fine of \$500 a day per innocent person would be much of a deterrent to the executive who is focused on stopping a possible second attack. Furthermore, the forty-five days of incarceration based on reasonable suspicion and perfunctory judicial review would likely result in incarcerations of whatever racial, national origin, or religious group was perceived to be responsible for the actual attack. Considering the Administration detained thousands of Muslims after 9/11 on immigration charges, it is not hard to imagine who would feel the brunt of Ackerman’s emergency

⁶⁴¹ Ackerman, *Before the Next Attack, Preserving Civil Liberties in an Age of Terrorism*, 85.

⁶⁴² *Ibid.*

constitution. In sum, while his proposal is accountable, transparent, and upholds separation of power principles, it tends to be overbroad, which decreases liberty but raises security.

In sum, Ackerman's approach after an actual attack occupies two places on the security/liberty continuum. For the first forty-five days, it tends to prioritize security at the expense of liberty. After the first forty-five days, where there is essentially no system of preventive detention and the criminal justice system is employed, it prioritizes liberty over security. In other words, his proposal swings like a pendulum between two extremes and never appreciates the benefits of balance.

d. Institutional Efficiency

Like the purist approach, the emergency constitution would pose minimal institutional or organizational costs. Detainees would be preventively detained under the criminal justice system for forty-five days based on reasonable suspicion and then the normal criminal justice system would operate. No new institutions would need to be created.

e. Conclusion

While Ackerman's emergency constitution may or may not be lawful, it does not provide a compelling model for preventive detention, mainly because it does not even begin to operate until after thousands of people are dead or dying. It seems more concerned with assuring the public than it is about saving lives. It does not appreciate the need to interrogate terrorist suspects to obtain actionable intelligence and it does not adequately provide the tools needed to incapacitate terrorists beyond forty-five days if the criminal justice system is inadequate. Furthermore, during the forty-five days of preventive detention, it needlessly errs on being overbroad and detaining innocent people all to reassure the public. Nonetheless, the concept of an emergency constitution and escalating supermajorities is intriguing – at least theoretically. It is recommended that Ackerman's book be studied but not applied to the real world as a solution for preventive detention of terrorist suspects.

F. DETENTION OF ENEMY COMBATANT ACT (DECA)

1. Description

As explained in Chapter V, in 2005, Rep. Adam Schiff (D-CA) introduced the Detention of Enemy Combatant Act (DECA) (HR 1076) to the House of Representatives but it never became law.⁶⁴³ The purpose of DECA was to “authorize the President to detain an enemy combatant who is a United States person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda, to guarantee timely access to judicial review to challenge the basis for a detention, to permit the detainee access to counsel, and for other purposes.”⁶⁴⁴ Significantly, the DECA explicitly stated that “Congress has a responsibility for maintaining vigorous oversight of detention of United States citizens and lawful residents to assure that such detentions are consistent with due process.”⁶⁴⁵ Furthermore, in order to detain an enemy combatant under DECA, the President would need to certify that (1) “the United States Armed Forces are engaged in a state of armed conflict with al Qaeda and an investigation with a view toward prosecution, a prosecution, or a post-trial proceeding in the case of such person or resident is ongoing or (2) detention is warranted in order to prevent such person or resident from aiding persons attempting to commit terrorist acts against the United States.”⁶⁴⁶ Importantly, the certifications would be effective for 180 days but renewable with successive certifications.⁶⁴⁷ Judicial review would occur in the United States District Court for the District of Columbia where detainees could challenge – with the assistance of counsel – the basis of the detention.⁶⁴⁸

⁶⁴³ *DECA*, H.R. 1076.

⁶⁴⁴ *Ibid.*

⁶⁴⁵ *Ibid.*, §2(16).

⁶⁴⁶ *Ibid.*, §5(a)(1).

⁶⁴⁷ *Ibid.*, §5(a)(2).

⁶⁴⁸ *Ibid.*, §5(b).

2. Analysis

a. Lawfulness

DECA, had it passed, would likely be lawful. The law explicitly provides for “timely access to judicial review to challenge the basis for a detention,” and the detainee is permitted access to counsel. Furthermore, judicial review would be in federal court. Hence, there is no suspension of the writ. While DECA does not specify when judicial review must occur, instead relying on the vagueness of “timely,” the plurality in *Hamdi* also failed to specify any particular time-frame. There is no reason to believe DECA would have been found to be unlawful.

b. Security

DECA has many provisions that emphasize security and protecting this nation from terrorist attacks. While DECA itself does not contain many of the particular and significant details concerning preventive detention, such as the standards for review, time-tables for review, how evidence will be gathered, or whether detainees can be interrogated incommunicado for a certain amount of time to enhance interrogation potential, the Secretary of Defense is supposed to consult with the Secretary of State and the Attorney General in creating such standards.⁶⁴⁹ In other words, as observed by James Weingarten from Harvard law, DECA empowers the *executive* branch, through the Secretary of Defense, to create the substantive rules of preventive detention: “Unless legislation compels more detailed disclosure, executive discretion alone will determine the contours of procedural rights of detainees.”⁶⁵⁰ In fact, the Secretary of Defense decides on the rules necessary to protect the “confidentiality” of information and rules that would “assist in the gathering of vital intelligence.”⁶⁵¹ Thus, while the Secretary of Defense is supposed to consult with the Attorney General and report to Congress, it is

⁶⁴⁹ DECA, H.R. 1076, § 3(b).

⁶⁵⁰ James Weingarten, “Recent Developments, The Detention of Enemy Combatants Act,” *Harvard Journal of Legislation*, 43 (2006): 195.

⁶⁵¹ DECA, H.R. 1076, § 4.

really the executive branch that would determine the substantive details of preventive detention that the legislative branches in other countries, such as Israel and Britain, have decided. By concentrating authority with the executive branch, DECA accelerates decision-making, thereby enhancing security.

c. Liberty

With respect to the liberty part of the continuum, however, DECA also contains provisions that directly address accountability and transparency. Significantly, the Secretary of Defense is supposed to report the standards to the Senate and House Judiciary Committees.⁶⁵² Furthermore, the President is required to report to Congress every twelve months on “each individual subject to, or detained pursuant to, the authority provided by this Act.”⁶⁵³ In this way, DECA seems accountable and transparent, and it adheres to balance of power principles in that Congress and the judiciary are engaged in the process of detaining terrorist suspects.

Nonetheless, as Weingarten points out, there is a concern that judicial review would not be meaningful, especially if the judiciary feels that DECA has “Congress’s imprimatur”: “congressional authorization would almost certainly have the effect of discouraging courts from undertaking searching reviews of detentions.”⁶⁵⁴ Hence, he recommends statutory improvements to include “express language regarding evidentiary standards, burdens of proof, and restrictions on interrogation techniques.”⁶⁵⁵

Overall, as Weingarten acknowledges, DECA does provide judicial review in federal court and protects U.S. persons from arbitrary and solely executive detention. Because it allows the Secretary of Defense to decide the substantive details, an argument could be made that DECA errs more on security. But because it requires accountability and transparency, it also protects liberty. Thus, overall DECA appears to strike a good balance between security and liberty.

⁶⁵² DECA, H.R. 1076, § 4.

⁶⁵³ Ibid., § 6.

⁶⁵⁴ Weingarten, “Recent Developments, The Detention of Enemy Combatants Act,” 196-97.

⁶⁵⁵ Ibid., 197.

DECA also appears to be narrowly-tailored to meet its objectives. It applies only to U.S. persons who are members of, or knowingly cooperate with, al Qaeda. Furthermore, the President must certify that the United States is “engaged in armed conflict with al Qaeda” and that an “investigation with a view toward prosecution, a prosecution, or a post-trial proceeding” of the detainee is ongoing or that detention is needed to prevent the detainee from “aiding persons attempting to commit terrorist attacks against the U.S.”⁶⁵⁶ Importantly, this preventive detention scheme is limited to al Qaeda, although al Qaeda seems to have transformed itself into a terrorist movement more than a specific hierarchical terrorist group. Nonetheless, DECA would not apply to a solely domestic terrorist threat or another group not affiliated with al Qaeda. In this way, it is narrowly-defined.

An argument could be made that it is too narrowly-defined in that it does not provide a preventive detention regime for other terrorist threats unrelated to al Qaeda. Yet, should another terrorist group pose a substantial threat to U.S. interests, Congress could simply amend DECA – especially if it had been working well – to encompass whatever future terrorist threat occurs. Hence, the fact that DECA is currently envisioned to only encompass al Qaeda, and thereby narrowly-defined, enhances liberty. If it included any terrorist group, it would be overbroad, increasing security at the expense of liberty. In sum, DECA seems to strike a decent compromise between liberty and security, even though most of the substantive details concerning preventive detention would be decided by the executive branch.

d. Institutional Efficiency

DECA would have low organization or institutional costs. Judicial review would occur at the existing United States District Court for the District of Columbia. Thus, there would be no need to create and staff a new court. In fact, since all judicial review would be consolidated in one court, an argument could be made that DECA enhances organization efficiency, especially because the judges from U.S. District Court of the District of Columbia could then gain an expertise in these matters.

⁶⁵⁶ DECA, H.R. 1076 § 5(a)(1).

e. Conclusion

Congress attempted to pass DECA in 2005 but it stalled in committee. Congress does not seem motivated to create a regime of preventive detention for U.S. persons. While DECA was only an attempt at an interim measure,⁶⁵⁷ its strengths were that it curbed executive unilateralism by providing for judicial review in federal court and called for reporting and accountability requirements to Congress. It would have been legal and organizationally efficient in that only one circuit would hear the cases. While it arguably errs on security more than liberty in that the Secretary of Defense would be promulgating the standards, it nonetheless has accountability and transparency and adheres to balance of power principles. It is recommended that Congress enact a statute to deal with preventive detention. DECA provides a good start but Congress should give thought to providing more of the substantive details into the legislation as have Israel and Britain.

G. FOREIGN INTELLIGENCE SURVEILLANCE COURT

1. Description

Assuming interrogation and incapacitation are viable justifications for preventive detention and policy-makers want to enhance national security, this paper advocates using the Foreign Intelligence Surveillance Courts (FISC) – a federal court established by The Foreign Intelligence Surveillance Act of 1978 (FISA)⁶⁵⁸ – to monitor a narrowly-prescribed regime for preventive detention. Although some individuals have suggested a specialized court system modeled after or similar to the FISC to monitor preventive detention, their proposals, as discussed above, concern the creation of a separate court

⁶⁵⁷ *151 Cong. Rec. E351* (daily ed. March 3, 2005) (statement of Rep. Schiff).

⁶⁵⁸ *Foreign Intelligence Surveillance Act of 1978 (FISA)*, Public Law 95-511, *U.S. Statutes at Large* 92 : 1783, codified as amended at *U.S. Code* 50 (1978), §§ 1801 *et seq.*

system.⁶⁵⁹ By contrast, this author advocates Congress amending FISA to allow the FISC to *directly* monitor any system of preventive detention for purposes of interrogation and/or incapacitation. While Terwilliger also advocates use of the FISC as one way to monitor a regime of preventive detention⁶⁶⁰ (he also suggests civil commitment, discussed above), the proposal outlined here provides more substantive details of how such an approach would operate.

FISA provides a statutory framework for the U.S. government to engage in electronic surveillance and physical searches to obtain foreign intelligence information.⁶⁶¹ FISA allows wiretapping of aliens and citizens in the U.S. based on a finding of probable cause to believe that the target is a member of a foreign terrorist group or an agent of a foreign power.⁶⁶² For U.S. citizens and permanent resident aliens, there must also be probable cause to believe that the person is “knowingly” engaged in activities that “may” involve a criminal violation.⁶⁶³ FISA also provides statutory authority to obtain an order from the FISC authorizing the production of tangible things including books, records, papers, documents, and other items for an investigation to obtain foreign intelligence information.⁶⁶⁴ Importantly, the FISC has jurisdiction to hear

⁶⁵⁹ See McCarthy, “Abu Ghraib and Enemy Combatants: An Opportunity to Draw Good Out of Evil;” Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 12. While Rishikof suggests that one approach for a terrorism court would be to expand the jurisdiction of FISA, he does not provide any specific details. See Rishikof, “A Federal Terrorism Court,” 4.

⁶⁶⁰ Terwilliger, “‘Domestic Unlawful Combatants’: A Proposal to Adjudicate Constitutional Detentions,” 61.

⁶⁶¹ Elizabeth Bazen, “The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview,” *Congressional Research Service Report for Congress* (CRS Order Code RL33833), 1-2, www.fas.org/sgp/crs/intel/RL33833.pdf (accessed September 7, 2007). A definition of “foreign intelligence information” is at *U.S. Code 50*, § 1801(e).

⁶⁶² *U.S. Code 50*, § 1805.

⁶⁶³ *Ibid.*, § 1801(b)(2). In other words, suspicion of illegal activity is not required in the case of aliens who are not permanent residents - for them, membership in a terrorist group is enough. Furthermore, any investigation of a U.S. person may not be conducted solely on the basis of activities protected by the First Amendment to the Constitution. *U.S. Code 50*, § 1805.

⁶⁶⁴ Bazen, “The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview,” 3.

applications for and to grant court orders approving electronic surveillance or physical searches *anywhere* in the United States to obtain foreign intelligence information under FISA.⁶⁶⁵

The FISC consists of eleven Article III judges appointed by the Chief Justice of the Supreme Court for seven-year terms.⁶⁶⁶ The FISC is not an adversarial court (much like a grand jury) and the federal government is the only party to its proceedings. Its hearings are closed to the public. As Heymann notes, FISA has been used more than 14,000 times and “worked admirably both in enabling intelligence officials to investigate foreign spies and terrorists, and in assuring the public that there are only limited, specific circumstances in which the government may use secret, intrusive investigative techniques.”⁶⁶⁷

This author suggests that the FISC should monitor any preventive detention regime during this war on terror. It is an institution within the judicial branch that already exists to deal with foreign intelligence matters based on *ex parte* showings by the government. While FISA currently only deals with electronic surveillance and physical searches – and not interrogation or incapacitation of intelligence assets – under this proposal, Congress could amend FISA to include these additional rationales.

Under this approach, U.S. persons who are detained in a peaceful civilian area would not be labeled “enemy combatants” but rather as a “terrorism intelligence asset” (TIA). This approach does not apply to true enemy combatants as understood by the Geneva Convention detained on an actual battlefield and held outside the United States as a preventive measure until the war ends. The government would need to prove by probable cause or reasonable suspicion – or some standard developed by Congress – that the detainee is an agent of a foreign power or foreign terrorist group, would prove to be a valuable intelligence asset, and/or is imminently going to commit a terrorist attack. Congress would also need to define what constitutes an “imminent attack” and need to

⁶⁶⁵ Bazen, “The U.S. Foreign Intelligence Surveillance Court and the U.S. Foreign Intelligence Surveillance Court of Review: An Overview,” 6.

⁶⁶⁶ *Ibid.*, 5.

⁶⁶⁷ Heymann, *Terrorism, Freedom and Security, Winning Without War*, 151.

establish how many days (e.g., thirty) the executive branch could hold the TIA before bringing him before the FISC for judicial review. While normally proceedings before the FISC are *ex parte* and the suspect is not entitled to counsel, given the Supreme Court's decision in *Hamdi* that enemy combatants must be allowed to challenge that designation before a neutral decision-maker, cleared defense counsel would assist the detainee with this process. The FISC would also require the government to outline its methods of interrogation (again, this process is closed to the public) to ensure that torture, however that is presently defined, is not used during interrogation.

Significantly, the executive branch would have to justify to the FISC why the criminal justice system in each particular case is inadequate to incapacitate or interrogate. Once the executive branch or FISC has determined that the TIA poses no risk of an imminent attack and is no longer providing useful intelligence information, the TIA must be released or transferred to the criminal justice system with specific charges. At this point, the normal Sixth Amendment rights to counsel would apply. Any information gleaned from the interrogation without the benefit of counsel during the TIA process could not be used in the criminal justice system. If the true purpose of designating an individual as a TIA is to gather intelligence information to stop a future attack, then such information cannot be used for prosecution. If it was used for prosecution, it would violate the Fifth Amendment and substantive due process as individuals have a right not to incriminate themselves.

Importantly, under this system, absent compelling circumstances, a TIA should not be held more than thirty or sixty days intervals, which could be successively renewed based on continued showings of necessity or dangerousness. Again, the rationale for a TIA is to incapacitate dangerous terrorists who plan on committing an imminent attack but where the criminal justice system proves inadequate to incapacitate and/or to interrogate the suspects to gain actionable intelligence. After those rationales are exhausted, a TIA must be set free or charged with specific criminal charges.

2. Analysis

a. Lawfulness

This approach using the FISC system would most likely be lawful. FISA and the FISC system already exist, so Congress would need to amend these statutes to allow for detention of TIAs for purposes of interrogation and/or incapacitation. As explained in Chapter IV, it is unlikely that the AUMF provides the necessary statutory authority to create a preventive detention regime for U.S. persons arrested in the United States and not on a battlefield. Because Congress would amend FISA as explained above, this system would be “pursuant to an Act of Congress,” and the problems with the Non-Detention Act would be avoided.

As for constitutional concerns, the Supreme Court has recognized that we are in a war on terror and that the executive has war powers to detain enemy combatants. While this FISC approach would not label any U.S. persons as enemy combatants but rather TIAs, the same rationale would apply. The need for TIAs is pursuant to the executive’s war powers, approved by an Act of Congress (i.e., modifications of the FISA statute), and monitored by the judicial branch. Moreover, it would likely constitute an adequate substitution for the writ of habeas corpus.

In the Supreme Court’s most recent pronouncement on habeas corpus, it stated that the “habeas privilege entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law, and the habeas court must have the power to order the conditional release of an individual unlawfully detained.”⁶⁶⁸ With respect to adequate substitutes for the writ, the Supreme Court noted that for the habeas writ, or its substitute, to function as an effective and meaningful remedy in this context, the court conducting the collateral proceeding must have some ability to correct any errors, “to assess the sufficiency of the Government’s evidence,” and “to admit and consider relevant exculpatory evidence that

⁶⁶⁸ *Boumediene*, slip op at 50.

was not introduced during the earlier proceeding.”⁶⁶⁹ This FISC approach would meet with these standards as Article III judges would have the power to assess the evidence and make substantive rulings and corrections. Hence, it would likely serve as an adequate substitute for the writ.

It would also comply with the plurality’s concerns in *Hamdi*. Meaningful judicial review would occur in a neutral forum with the assistance of counsel. In fact, as explained above, *Hamdi* allowed for the forum to be a military tribunal in the executive branch. This approach, by contrast, would have the judicial review run by federal judges thereby enhancing its legitimacy. Furthermore, while the plurality in *Hamdi* noted that the AUMF did not authorize detention for interrogation but only incapacitation during the war in Afghanistan, as explained in Chapter IV, there is no reason to believe Congress could not enact legislation allowing detention for purposes of interrogation – a fact that Justice Scalia explicitly noted in his dissent. Importantly, the privilege against self-incrimination is an evidentiary one – a violation only occurs if the confession is used at a trial. In other words, there is no constitutional bar to interrogating a detainee without the benefit of counsel if the resulting information is not used against the suspect at a subsequent trial. Thus, this FISC approach allowing for preventive detention for purposes of incapacitation and/or interrogation would likely be lawful.

b. Security

As for the security part of the continuum, the FISC approach allows for preventive detention based on interrogation and incapacitation, which are the main justifications for President Bush’s enemy combatant policy. It just tempers these legitimate rationales (see Chapter III) with due process and institutional efficiency, as discussed below. One potential negative of this approach from a security standpoint is that TIAs could not be held indefinitely to prevent them from committing terrorist attacks in the future. After their value as an intelligence asset is exhausted and they no longer pose an imminent threat, they must be released or, more likely, transferred to the criminal justice system. As Schulhofer and Turner have argued, the existing statutes of CIPA, the

⁶⁶⁹ *Boumediene*, slip op at 50, 57.

Speedy Trial Act, and the 1984 Bail Reform Act, perhaps with modifications by Congress, can successfully be used to detain and try terrorism suspects in Article III courts. Therefore, there is no need to create an alternative court system with all the institutional inefficiencies (e.g., new jurisdictional issues) to try terrorism suspects once they are no longer TIAs.

While the problems identified previously with trying terrorist suspects in federal court remain real, the FISC approach as outlined here would mitigate some of those concerns. If evidence is inadmissible, classified, or there is a concern with revealing sources and methods (that CIPA could not obviate), the individual could be nonetheless detained under the FISC approach as a TIA. Yet, actual trials would occur in ordinary federal court. As Moore, Roth, Zabel, and Benjamin noted above, the criminal justice system has worked remarkably well, albeit not perfectly, with espionage and terrorism prosecutions. According to Zabel and Benjamin, between September 11, 2001 and December 31, 2007, there have been 257 individuals charged in terrorism prosecutions.⁶⁷⁰ As of May 2008 when they published their white paper, 97 defendants still had pending charges, while the remaining 160 defendants' cases had been resolved either by conviction, acquittal, or dismissal.⁶⁷¹ Of the 160, 145 resulted in conviction of at least one count either by guilty plea or guilty verdict after trial.⁶⁷² Hence, there were 15 defendants who were acquitted of all charges or had their charges dismissed. While they do not detail the specifics of these 15 people (although they do note that one of the 15 was al-Marri who the government designated as an enemy combatant after his criminal charges were dropped), they conclude that the criminal justice system has worked considerably well and does not need to be changed for the extremely few anomalies.

⁶⁷⁰ For purposes of their methodology, Zabel and Benjamin define terrorism prosecutions as terrorism that is "associated—organizationally, financially, or ideologically—with Islamist extremist terrorist groups like al Qaeda." Zabel and Benjamin, "In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts," 22. Their detailed methodology is discussed on pages 21-24.

⁶⁷¹ Zabel and Benjamin, "In Pursuit of Justice, Prosecuting Terrorism Cases in the Federal Courts," 26.

⁶⁷² *Ibid.*

This FISC approach as outlined here recognizes the adaptability and competence of the criminal justice system in detaining and incapacitating terrorists. Nonetheless, it allows for a procedure to be used for those “anomalies” or rare occasions, where the criminal justice system proves inadequate. In other words, the FISC approach is all about balance. There can be preventive detention – monitored by the FISC judges – when the criminal justice system cannot incapacitate or when interrogation to obtain actionable intelligence is needed. Trials, however, need to occur in the normal criminal justice system with upgrades to statutes if warranted.

c. Liberty

The FISC approach does a superior job of balancing liberty and security. It clearly upholds balance of power principles as FISA would be amended by Congress and federal judges would be responsible for the judicial review. It would also be accountable, especially if it borrowed provisions from DECA requiring annual reports to congressional oversight committees on its findings and if the executive branch were forced to report to Congress on the details of TIA detainees. While its proceedings would be closed to the public (and hence not transparent, thereby decreasing liberty but increasing security), the FISA judges could require the executive officials to specify the exact interrogation methods being employed and report every thirty days on progress and effectiveness. In this way, interrogation would be monitored by the judicial branch and effectively studied. As eluded to in Chapter III, such accountability might make individuals who are squeamish about coercive interrogation more comfortable with the concept of preventive detention as a way to gain actionable intelligence.

The FISC approach would also be narrowly-tailored to meets its objectives – in fact, this is one of its overriding strengths. Significantly, the executive branch would have to justify to the FISC why the criminal justice system in each particular case is inadequate to incapacitate or interrogate. As explained in Chapter III, one way to obtain intelligence is to offer a deal and attempt to have the detainee cooperate. The government would need to justify to the FISC why such an approach is not feasible and that preventive detention as a TIA is necessary to gain actionable intelligence. If

incapacitation is the rationale, the executive branch would need to show why statutes such as conspiracy, attempt, or providing material support to terrorists – or alternative charges such as lying to a federal agent or credit card fraud – would not be effective in any particular case. For instance, as explained in Chapter III, the evidence may have been provided by a foreign intelligence asset, obtained by unsavory means, or be otherwise inadmissible in a court of law. In other words, the executive branch would need to justify to the judicial branch why a deviation from the criminal justice system is imperative. In this way, the FISC approach would be narrowly applied only when the criminal justice system is inadequate to protect the nation from terrorist attacks.

Furthermore, the FISC could also be flexible in arranging for alternatives to incarceration as a way of preventive detention. If the rationale for preventive detention was incapacitation – as opposed to interrogation – the FISC could allow milder restraints such as house arrest, better conditions of confinement, or implantation with a tracking device. Britain employs such methods with its “control orders.”

Importantly, as discussed in Chapter II, it would be advantageous to have a preventive detention regime that can incorporate the present threat level at any particular time as opposed to having its underlying legitimacy being based on the threat level. By having the FISC monitor a preventive detention regime for the purposes of incapacitation and/or interrogation, the FISC could take into account the threat level in making its decisions. For instance, if a terrorist attack rivaling 9/11 occurred, and the executive branch asserted it needed to preventively detain certain individuals for interrogation and/or incapacitation – and explained why the criminal justice system was inadequate – the FISC could be more deferential to the executive branch during the emergency. Nonetheless, unlike the enemy combatant policy, there would still be judicial review, and the executive branch, as in Israel, would need to continually provide updated justifications to the FISC for prolonged preventive detention.

One singular advantage of having the FISC monitor preventive detention is that problems with “mission creep” are avoided. Clearly, arguments could be made for incapacitation and interrogation of drug dealers, serial murderers, rapists, and child abusers. By having a court system, whose sole justification is surveillance of foreign

intelligence, monitor the preventive detention regime, it would be incredibly difficult, if not impossible, to have zealous prosecutors try to manipulate the FISC system to interrogate a drug dealer or murderer unrelated to terrorism. At it stands now, FISA requires an executive branch official to certify that “a *significant* purpose of the surveillance is to obtain foreign intelligence information.”⁶⁷³ In other words, by having the preventive detention regime run by the FISC, there would be less concerns that the ordinary criminal justice system would gradually be broadened or infected by the allowances needed to prosecute and detain terrorists.

One outstanding question that would need to be addressed by Congress is whether the FISC approach as described in this paper would only concern international terrorism or whether it could concern domestic terrorism. Given that FISA was created for the purpose of foreign surveillance and not domestic surveillance, which is governed by The Federal Wiretap Act,⁶⁷⁴ it is likely that the FISC approach as articulated here would need to be limited to international terrorists and true foreign surveillance, which would include U.S. persons working or knowingly providing material support to al Qaeda. Ostensibly, this would encompass Hamdi, al-Marri and Padilla but not Timothy McVeigh.

In sum, the FISC approach as outlined here would be narrowly-tailored, run by the judicial branch, and could be made accountable with reporting requirements to Congress. It would be less transparent than the purist approach, however. Given the need for secrecy, especially if the exact interrogation methods were revealed, the proceedings would need to remain *ex parte*, albeit with cleared defense counsel assisting the TIA during the designation process. Yet, transparency would occur during the subsequent criminal trials of any TIAs.

⁶⁷³ *U.S. Code* 50, § 1804(a)(7)(B). (Emphasis added).

⁶⁷⁴ *Federal Wiretap Act, U.S. Code* 18 (1968), §§ 2510 *et seq.*

Overall, the FISA approach respects both liberty and security but not at either extreme. By separating out the rationales for preventive detention – and allowing TIAs to be detained solely for incapacitation and interrogation but not trials – it has a low chance of adversely affecting ordinary crime unrelated to terrorism.

d. Institutional Efficiency

It would also be organizationally efficient. The FISC already exists – there would be no need to create a new court system or hire new staff. Rather, the same judges who form the FISC and have an expertise in foreign intelligence matters would be making the substantive decisions.

e. Conclusion

The FISA approach recognizes that preventive detention may be needed as a tool in the war on terror. It legitimizes to some extent President Bush’s underlying rationales for preventive detention. Yet, it also acknowledges that the criminal justice system as it currently exists, or with minor modifications, has done a remarkably good job of incapacitating terrorists. In fact, according to the Department of Justice, between September 11, 2001 and June 2008, 401 individuals have been criminally charged in the United States in terrorism-related investigations.⁶⁷⁵ While this is a higher number than Zabel and Benjamin’s data discussed previously (presumably because “terrorism” is defined differently), it proves that the criminal justice system can primarily handle the detention, incapacitation, and prosecution of terrorists. Nonetheless, the FISC approach would serve to operate in those instances – or fill in the gap – where the criminal justice system was incapable of protecting our nation but in a way that respects separation of power principles, curbs executive unilateralism, and upholds due process.

Importantly, some policy-makers have recognized the benefits of using the FISC to monitor preventive detention, although without a detailed analysis. For instance, Wittes and Gitenstein note: “The national security court approach has worked effectively

⁶⁷⁵ Department of Justice, “Preserving Life and Liberty,” http://www.lifeandliberty.gov/subs/a_terr.htm (accessed June 21, 2008).

in the surveillance area for 30 years and could be tailored to the detention arena.”⁶⁷⁶ Terwilliger attests, “[FISA] has the hallmarks and characteristics of a legal process which meets constitutional muster under due process standards, yet at the same time preserves the secrecy necessary to avoid the catastrophic consequences of revealing intelligence sources, methods and the information produced from them.”⁶⁷⁷ Heymann observes: “We know that the Foreign Intelligence Surveillance Act has worked, and worked well. If specific additional powers are needed, they can and should be legislated by a very willing Congress.”⁶⁷⁸

It is recommended that the FISA approach be adopted by the next Administration as a way to handle preventive detention of terrorist suspects where the criminal justice system is inadequate. It is lawful, narrowly-tailored, organizationally efficient, and adheres to separation of power principles. Because the FISA approach can incorporate the threat level at any particular time, it can be used if the threat from terrorism is low, medium, or high. It also uses a label of “TIA” and stops calling terrorists “combatants” which, as explained in Chapter II, glorifies them when they are more like criminals. As Justice Anthony Kennedy recently wrote for the majority in *Boumediene*, “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system reconciled within the framework of the law.”⁶⁷⁹ This author posits that the FISA approach reconciles liberty and security within a framework of the law and that the next Administration should give it serious consideration.

⁶⁷⁶ Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 13.

⁶⁷⁷ Terwilliger, “‘Domestic Unlawful Combatants’: A Proposal to Adjudicate Constitutional Detentions,” 61.

⁶⁷⁸ Heymann, *Terrorism, Freedom and Security, Winning Without War*, 151.

⁶⁷⁹ *Boumediene*, slip op at 70.

H. CONCLUSION

Justice Felix Frankfurter wisely observed that “[t]he history of liberty has largely been the history of the observance of procedural safeguards.”⁶⁸⁰ President Bush’s enemy combatant policy is devoid of procedural safeguards. While the executive branch is supposed to err on security and therefore prefer policies that are arguably overbroad, the ingenuity of the Founding Fathers was the balance of powers. The executive branch can zealously try to preventively detain terrorists if their zeal is tempered by procedural safeguards and separation of power.

In this chapter, alternative ideas to President Bush’s enemy combatant policy have been categorized and analyzed under a methodology encompassing key democratic principles. While the substantive details between these proposals differ, the unifying theme seems to be an urge for Congress to become involved and either suspend the writ (purist approach), enact legislation creating a new court system, enact an emergency constitution, or modify existing statutes such as CIPA, the Speedy Trial Act, the Bail Reform Act, civil commitment laws, or, as this author recommends, amend FISA. As Stuart Taylor from the Brookings Institution notes, “[c]onsidered congressional action based on open national debate is more likely to be sensitive to civil liberties and to the Constitution’s checks and balances than unilateral expansion of executive power.”⁶⁸¹ In sum, Congress has been disappointingly silent throughout the past seven years and it is time – perhaps with the impetus of new presidential leadership – to enact a comprehensive scheme for preventive detention of U.S. persons in this war on terror.

⁶⁸⁰ Sunstein, “Monkey Wrench, The Supreme Court has always thwarted presidents who demand unlimited legal power in wartime.”

⁶⁸¹ Taylor, “Rights, Liberties, and Security: Recalibrating the Balance after September 11.”

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VIII. CONCLUSION: CONGRESS, WHERE ART THOU?

Only Congress can ultimately write the law of this long war.

-Benjamin Wittes⁶⁸²

After September 11, 2001, the Administration decided to detain certain individuals suspected of being members or agents of al Qaeda or the Taliban as enemy combatants and hold them indefinitely and incommunicado for the duration of the war on terror. The rationale behind this system of preventive detention is to incapacitate suspected terrorists, facilitate interrogation, and hold them when traditional criminal charges are not feasible for a variety of reasons. By employing an armed-conflict model that treats terrorists as “combatants,” the Bush Administration argues it can preventively detain terrorists until the end of hostilities, despite there being no foreseeable ending scenario to an amorphous war on terror. Furthermore, terrorists are automatically unlawful or enemy combatants and hence not entitled to protections as true prisoners of war; yet, under the Bush Administration’s approach, they also are not entitled to the legal protections afforded criminals. Significantly, by not filing any criminal charges, none of the procedural and substantive rights attaching to criminal prosecutions would occur, such as right to counsel, right to a speedy and public trial, right to exculpatory information, etc. While terrorism is a grave threat that should not be underestimated, it does not pose the same existential threat as previous conflicts. It merely requires a novel approach and new tools to thinking about the problem instead of relying on outdated methods and obsolete thought-processes.

As Wittes and Gitenstein attest, “Indefinite detention, even of non-citizens, runs counter to foundational notions of what this country stands for.”⁶⁸³ Whether it is called administrative detention as in Israel, pre-charge detention as in Britain, or executive detention as in the United States, preventive detention is based on what could happen and

⁶⁸² Wittes, *Law and the Long War*, 133.

⁶⁸³ Wittes and Gitenstein, “A Legal Framework for Detaining Terrorists, Enact a Law to End the Clash over Rights,” 8.

not based on what has happened. Independent of whether terrorists are labeled as “criminals” or “combatants,” it is detention based less on conduct than on potential and associational status. Preventive detention may even be counterproductive by alienating the very groups of people needed to win this war on terror. Nonetheless, in a world with weapons of mass destruction and determined enemies who want to kill thousands – if not millions – of innocent civilians, it may be necessary. As Rosenzweig and Carafano at the Heritage Foundation note “to reject preventive detention in those rare circumstances in which it is necessary is to exalt liberty at the expense of security.”⁶⁸⁴ There should be no delusions, however: there is no perfect way for a democracy to create a regime of preventive detention. It will always be over-inclusive; there will always be errors; and it will always feel and be troublesome. Hence, the concept of preventive detention is troubling to the tenets of any true democracy.

So how did we get here? The Bush Administration reacted to the shock of 9/11 with several forms of preventive detention before employing its enemy combatant policy. First, it detained thousands of Muslims on immigration charges and then applied the material witness statute to detain others, including U.S. citizens such as Padilla. Ultimately, the confluence of the needs for actionable intelligence and incapacitation coupled with a perception that the criminal justice system was inadequate to meet these objectives resulted in the enemy combatant policy.

While the rationale for preventive detention is legitimate and the need for preventive detention real, the current Administration’s approach has been reactionary, illogical, and probably unconstitutional. Moreover, the decision-making process to label individuals as enemy combatants resides entirely within the executive branch, thereby bypassing the checks and balances that comprise our democratic system. The current Administration’s approach also makes no distinction between an accused terrorist and a convicted terrorist, thereby undermining a core principle of our democratic system that people are innocent until proven guilty.

⁶⁸⁴ Rosenzweig and Carafano, “Preventive Detention and Actionable Intelligence,” 9.

The pivotal question becomes: how do we as a society handle the competing interests of liberty and security and pick an optimal solution based on the circumstances and threat level? If the threat level is low – and expected to remain low – then the criminal justice system can incapacitate terrorists as it has done for decades. As discussed in Chapter II, however, based on the July 2007 *National Intelligence Estimate* and other indications, it does not appear the threat level is abating, despite the fact that we have not suffered another terrorist attack since 9/11. Based on the evidence discussed in Chapter III, it appears that several specific plots have been stopped and additional terrorists captured based in part on interrogation that was facilitated by labeling individuals as enemy combatants. Assuming that is true does not mean the enemy combatant policy is lawful or a sound policy that should be embraced. Rather, it just acknowledges that the United States – as Britain and Israel have recognized – may very well need a system of preventive detention to deal with terrorist threats. To that end, this paper has described, classified, and analyzed alternatives to the enemy combatant approach by applying a methodology encompassing democratic principles to begin to unpack the complicated factors involved in the necessary evil of preventive detention.

Significantly, as explained in Chapter V, Israel and Britain have shown that democracies facing comparable terrorist threats can implement preventive detention policies that are not based on unilateral executive usurpation of power. While their policies are no means perfect and frequently criticized by human rights groups, Israel and Britain have managed to allow their respective legislatures to play a significant role in creating the substantive standards for preventive detention and judicial review. To get out of this quagmire, Congress should address details concerning preventive detention such as how long an individual can be detained without access to counsel for purposes of interrogation and how long an individual can be overall detained before release or criminal charges. As former chief judge of the U.S. Court of Appeals for the D.C. Circuit observes, “Congress is the branch of government directly responsible, along with the executive, to the citizenry for the reconciliation of wartime securities and civil liberties, and Congress must fully accept this moment of responsibility.”⁶⁸⁵

⁶⁸⁵ Patricia Wald, “The Supreme Court Goes to War,” 67.

In May 2007, journalist Stuart Taylor presciently predicted that no satisfactory resolution of the detention of terrorists seemed likely until at least 2009 when we would have a new President who would perhaps take the advice of “moderate-spirited experts.”⁶⁸⁶ This appears to be the case as a Senate hearing on citizen detentions that was scheduled to occur in October 2002 was indefinitely postponed.⁶⁸⁷ While Congress appears somewhat more motivated to enact legislation dealing with the aliens at Guantanamo Bay (as discussed in Chapters IV and V, it enacted the DTA and MCA in response to the Supreme Court decisions *Rasul* and *Hamdan*), Congress has been virtually paralyzed when it comes to the question of the detention of U.S. persons being detained in America as enemy combatants. Although DECA was proposed, it stalled in committee in 2005, and there does not appear any impetus to resurrect it. In sum, as addressed in Chapter IV, Congress needs to enact a preventive detention regime that is both constitutional and pursuant to an Act of Congress before the next catastrophic terrorist attack.

As an alternative approach to the Administration’s enemy combatant policy, this paper suggests using the Foreign Intelligence Surveillance Court to designate terrorist suspects as “terrorism intelligence assets” (TIAs) if the government can prove by some standard developed by Congress that the suspect could prove to be a valuable intelligence asset to prevent future attacks or that the suspect poses an imminent risk of a terrorist attack and hence needs to be incapacitated. Importantly, the FISC approach would only be relevant if the criminal justice system proved inadequate to detain or interrogate terrorist suspects. After the interrogation and/or incapacitation rationales for the TIA designation are exhausted (the FISC could monitor preventive detention every thirty or sixty days), the TIA must be released or transferred to the criminal justice system. There is no need to create separate tribunals to try terrorist suspects. The various statutes that already exist can protect the secrecy of classified materials and deal with the evidentiary issues that arise in trying terrorist suspects in Article III courts.

⁶⁸⁶ Taylor, “Terrorism Suspects and the Law.”

⁶⁸⁷ “(POSTPONED) The Constitution and the Detention of US Citizens as Enemy Combatants,” *United States Senate, Committee on the Judiciary*, October 8, 2002, <http://judiciary.senate.gov/hearing.cfm?id=471> (accessed June 26, 2008).

While this author believes the FISC approach is superior to the alternatives proposed, the overriding recommendation is that a more balanced solution than the enemy combatant policy be enacted. As this paper described in Chapter VII, there are three moderate alternatives to the enemy combatant policy: (1) create a national security court; (2) adjust/modify the criminal justice system to incorporate the preventive detention and trials of terrorists, or (3) amend FISA and have the FISC monitor a regime of preventive detention.

Option 1, the national security courts, errs on security and imposes huge institutional and organizational costs, especially by introducing new jurisdictional issues and hurdles best to be avoided given the minimalist nature of the judiciary.

Option 2, modifying existing statutes, tends to favor liberty (although as Chapter VII explains that depends on the specific modifications proposed) but would likely be on a slippery slope of gradually contaminating ordinary criminal law.

Option 3, the FISC approach, seems to strike the optimal balance between liberty and security as it allows preventive detention for purposes of incapacitation and interrogation but also recognizes that trials should occur in normal Article III courts. It is narrowly-tailored in that the executive official would have to explain why the criminal justice system in any particular case was inadequate to incapacitate or interrogate the individuals, thus putting pressure on the executive branch to use the criminal justice system when feasible. Furthermore, by having a court system whose sole justification is surveillance of foreign intelligence monitor the preventive detention regime, it would be incredibly difficult, if not impossible, to have zealous prosecutors try to manipulate the FISC system to interrogate a drug dealer or murderer unrelated to terrorism. The FISC approach is also institutionally efficient as the Article III judges that comprise FISA have an expertise in foreign intelligence matters.

Whatever moderate option is selected, Congress needs to enact a preventive detention regime. As Attorney General Mukasey eloquently notes: “Perhaps the world’s greatest deliberative body (the Senate) and the people’s house (the House of Representatives) could, while we still have the leisure, turn their considerable talents to

deliberating how to fix a strained and mismatched legal system, before another cataclysm calls forth from the people demands for hastier and harsher results.”⁶⁸⁸ It is time for Congress to act.

⁶⁸⁸ Mukasey, “Jose Padilla Makes Bad Law.”

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